SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, ETC., PETITIONER,

vs.

H. B. ZACHRY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor

vs.

H. B. ZACHRY COMPANY, a corporation

Joint Designation of Contents of Record on Appeal—Filed June 7, 1958

Comes now the parties, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, and designate the following portions of the record, proceedings and evidence, to be contained in the record on appeal:

(1) Reporter's complete transcript of all the testimony and evidence adduced on October 4, 1957, on the hearing on plaintiff's motion for temporary injunction, together with all exhibits offered in evidence at that time.

(2) Reporter's complete transcript of all the testimony and evidence adduced at the trial of the merits on February 21, 1958, together with all exhibits offered in evidence at that time.

(3) Plaintiff's original complaint filed September 12, 1957.

2 (4) Order to show cause filed September 13, 1957,

(5) Motion for more definite statement filed October 3, 1957.

(6) Defendant's original answer filed October 3, 1957.

(7) Response to show cause order filed October 3, 1957.

(8) Court's memorandum decision filed December 13, 1957.

(9) Order denying preliminary injunction and setting case for trial on merits filed December 13, 1957.

(10) Order entered during first day's hearing before the Court filed February 21, 1958.

(11) Trial amendment to answer filed February 21, 1958.

(12) Memorandum opinion filed March 14, 1958.

(12a) Concise Statement of Points on Which Defendant-Appellant Intends to Rely on Appeal filed the 6 day of June, 1958.

(13) Final decree filed and entered on April 3, 1958.

(14) Joint motion to send up original exhibits in lieu of copies thereof filed on 6th day of June, 1958.

(15) Order of court to send up original exhibits in lieu of copies filed 7th day of June, 1958.

(16) Plaintiff's motion to send up original exhibits offered in evidence on February 21, 1958.

(17) Order of court transmitting original exhibits
3 offered by plaintiff on February 21, 1958.

(18) Notice of appeal filed by defendant May 22, 1958.

(19) Notice of appeal filed by plaintiff May 23, 1958.

(20) This designation.

(21) Bond for Costs on Appeal filed May 22, 1958.

(s) STUART ROTHMAN,
Solicitor,

(s) EARL STREET,

(s) HARRY CAMPBELL, JR.,
Assistant Regional Attorney,

UNITED STATES DEPARTMENT OF LABOR,
Attorneys for Plaintiff.

(s) ALLEN WOOD,

(s) CHESTER JOHNSON,

(s) SIDNEY CALLENDER,

(s) R. DEAN MOORHEAD,
Attorneys for Defendant.

4 [Caption omitted]

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5 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Civil Action File No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Plaintiff*,

v.

H. B. ZACHRY COMPANY, a corporation, *Defendant*.

Complaint—Filed September 12, 1957

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C., Title 29, Section 201, et seq.), hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

6 Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Texas, having its principal office in the city of San Antonio, Bexar County, Texas, with branch offices being set up in various locations from time to time for the supervision of specific projects. It is, now and at all times hereinafter mentioned was, engaged in carrying on certain operations, to-wit, the construction of a dam on the Nueces River, near Mathis, San Patricio County, Texas, under contract with the Lower Nueces River Water Supply District, said District being organized under the laws of the State of Texas.

IV.

At all times hereinafter mentioned defendant employed, and is now employing, approximately 300 employees in the aforesaid construction operations in San Patricio County, Texas. Said employees are now, and have been, engaged in the production of goods for interstate commerce, within the meaning of the Act, in that the said dam and reservoir under construction are designed to and will, improve, enlarge, extend and constitute a reconstruction of the water distribution system of the City of Corpus Christi, Texas, the said system regularly furnishing substantial quantities of water for use in the manufacture of goods to be shipped in interstate commerce.

7

V.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of its employees in the production of goods for interstate commerce, as aforesaid, for workweeks longer than 40 hours since on or about December 1, 1955, without compensating said employees for their employment in an excess of 40 hours, in workweeks during said period, at rates not less than one and one-half times the regular rate at which they were employed,

VI.

Defendant has, and is now, violating the aforesaid provision of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays judgment:

(1) Temporarily enjoining and restraining the defendant, its officers, agents, servants, employees and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Act during the pendency of this action;

(2) Permanently enjoining and restraining the defendant, its officers, agents, servants, employees and all

persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Act; and,

(3) For such other and further relief as may be necessary and appropriate.

(s) STUART ROTHMAN,
Solicitor,

(s) EARL STREET,
Regional Attorney

(s) HARRY CAMPBELL, JR.,
Assistant Regional Attorney,

UNITED STATES DEPARTMENT OF LABOR,

Post Office Address:
Earl Street, Regional Attorney,
Office of the Solicitor,
U. S. Department of Labor,
Room 217, 1114 Commerce Street,
Dallas 2, Texas,

or

Solicitor,
U. S. Department of Labor,
Washington 25, D. C.

STATE OF TEXAS }
COUNTY OF BEXAR } ss.

Affidavit of L. C. Chandler

L. C. Chandler, of lawful age, being first duly sworn on oath, says:

That he is an investigator of the Wage and Hour and Public Contracts Divisions, United States Department of Labor, and a duly authorized representative of the Administrator of said Divisions, and of the Secretary of Labor. That as such investigator he did, on the 18th day of March, 1957, open an investigation of the operations of

H. B. Zachry Company, Inc., a corporation, carried on near Mathis, San Patricio County, Texas, in connection with the construction of the dam across the Nueces River.

Said dam is being constructed under contract between the said H. B. Zachry Company and the Lower Nueces River Water Supply District, dated sometime in December, 1955, the said project covered by said contract being known as the Wesley E. Seale Dam Project on the Nueces River in Jim Wells and San Patricio Counties, Texas. The said dam is being constructed approximately 1200 feet down stream from the existing dam formerly owned by the City of Corpus Christi, but now owned by the
10 Lower Nueces River Water Supply District, and consists of the construction of an earth filled dam with all necessary spillways, etc., and the removing of the top portion of the existing Lake Corpus Christi Dam.

The said dam is being constructed for the purpose of improving, enlarging, extending and reconstructing the water distribution system owned by the City of Corpus Christi, in that it will materially increase the supply of raw water available to the said water distribution system of the City of Corpus Christi and of outlying communities, for municipal and industrial purposes.

The said water distribution system of the City of Corpus Christi has, and and will in the future, furnish substantial amounts of water, both raw and treated, to industrial concerns located in the City of Corpus Christi, Texas, and the vicinity thereof, for use by such concerns in the manufacture of goods, or use thereof as a part and ingredient of such goods, the requirements of the various concerns running many millions of gallons of water per day. Among such concerns are included Reynolds Aluminum Company, Great Southern Chemical Company, Central Power & Light Company, Columbia Southern Chemical Corporation, American Smelting and Refining Company, Delhi-Taylor Oil Corporation and Corn Products Refining Company. Each of such concerns are engaged in the production of goods for shipment to points without the State of Texas.

11 An examination of the books and records of the said H. B. Zachry Company, a corporation, and particularly of their payroll records, reflect that during the

period subsequent to the beginning of construction of said Wesley E. Seale Dam Project, that employees employed upon said project have been paid overtime compensation, at a rate of one and one-half times their regular rates, for hours worked by them in excess of eight hours per day and for hours worked by them on Sunday. They have not been paid overtime at a rate of not less than one and one-half times their regular rates of pay for hours worked by them in excess of 40 hours in the workweek, excluding the hours in excess of eight in the day or on Sunday. That the failure to compensate said employees for the hours worked by them in excess of 40 in the workweek, excluding hours in excess of eight hours per day and on Sunday, is a violation of Section 7 of the Fair Labor Standards Act of 1938, as amended.

Further affiant saith not.

(s) L. C. CHANDLER.

Subscribed and sworn to before me this 9 day of September, 1957.

(s) H. F. CORDWELL,
Notary Public.

(SEAL)

My Commission expires:
June 1, 1959.

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12 IN UNITED STATES DISTRICT COURT

Order to Show Cause—September 12, 1957—Filed September 13, 1957

Upon consideration of the complaint and affidavit filed herein, and the application of the plaintiff for a temporary injunction, it is,

ORDERED that the defendant show cause on the 4th day of October, 1957, at 9:30 o'clock in the forenoon in the United States District Courtroom, United States Post Office and Courthouse, Corpus Christi, Texas, if any it can, why a preliminary injunction should not issue enjoining and restraining the defendant, its officers, agents, servants, employees and all persons acting or claiming to act in

its behalf and interest, from failing and refusing to comply with the provisions of Section 15(a)(2) of the Fair Labor Standards Act, as amended, and, in particular, from failing and refusing to compensate its employees engaged in the production of goods for interstate commerce, as that term is defined by the Act, in workweeks in which they are employed in excess of 40 hours at rates not less than one and one-half times their regular rates of pay for hours in excess of 40 in such workweeks, in violation of Sections 7 and 15(a)(2) of the Act.

Dated this 12th day of September, 1957.

(s) JAMES V. ALLRED,
United States District Judge

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13 IN UNITED STATES DISTRICT COURT

Response to Show Cause Order—Filed October 3, 1957

Defendant appearing herein in response to Order to Show Cause of this Honorable Court, dated September 1957, respectfully alleges:

I.

While Defendant admits the jurisdiction of the Court, it denies the allegations contained in Paragraph III of the Complaint, and in this connection says that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal office in the City of San Antonio, Bexar County, Texas, with branch offices from time to time set up in various locations in connection with specific projects.

II.

Defendant denies the allegations of Paragraph IV of the Complaint, except that it alleges that on the construction operations in question it has employed from time to time since the beginning of such project numbers of employees varying from about 85 to approximately 400, and at the present time there are about 87 employees on said job.

III.

Defendant denies the allegations of Paragraphs
14 V and VI of the Complaint and attaches hereto an affidavit of H. B. Zachry; which is marked Exhibit "A" and referred to for all purposes.

IV.

Further answering; Defendant alleges that to grant a temporary injunction herein would not maintain the status quot but would destroy it, and even though a proper determination of the issues involves questions of fact, to grant the temporary injunction would afford Plaintiff all the relief to which it would be entitled in a hearing on the merits. In the event a temporary injunction herein should be granted, as prayed for by Plaintiff, Defendant would be compelled to make the payments to its employees as provided for by the Fair Labor Standards Act, and if, upon trial on the merits, the position of the Defendant that the job in question is not covered by such Act should be sustained, it would be impractical, if not impossible, for Defendant to recover such payments from any of the employees because many construction workers are itinerant in habits as they go from one construction job to another in different parts of the country. But even if this were not so, as a practical matter to try to obtain a recovery of such payments from an employee who remained in the employ of Defendant would be very difficult and at best would create unfavorable employer-employee relationship. On the
15 other hand, if such temporary injunction were not granted, and upon trial on the merits it should be determined that the operation in question was covered by the provisions of the Fair Labor Standards Act, Defendant represents that it is solvent and responsible and able to make the payments provided for by said Act. Defendant further alleges that the same ultimate questions of fact and of law are involved on a hearing for temporary injunction as are on the merits and that it seems to Defendant to be a time-consuming, unnecessary, and improvident operation to have two similar hearings to determine the same issues.

V.

In addition to the foregoing, Defendant says that from the very general allegations of the Complaint it is unable to ascertain just which employees are claimed to be covered by the Act. On the construction job in question various kinds and classes of employees are engaged, such as executive, administrative, professional, supervisory, and other exempt classifications.

VI.

Defendant points out that the Complaint though it generally and by way of conclusion charges that Defendant violates a statute, to support such conclusion it merely alleges further conclusions that the employees are now and have been engaged in the production of goods for
16 interstate commerce within the meaning of the Act in that the said dam and reservoir under construction are designed to and will improve, enlarge, extend, and constitute a re-construction of the water distribution system of the City of Corpus Christi, Texas, that said system regularly furnishes substantial quantities of water for the use in the manufacture of goods to be shipped in interstate commerce, which pleading does not state any definite facts to support such conclusion and does not supply the requirements even of "Notice Pleading" sufficiently to inform Defendant of facts Plaintiff intends to prove in support of such conclusions and Defendant is unable to ascertain what allegations of fact it will be necessary for it to controvert upon a hearing for the temporary injunction. In other words, the allegations of the Complaint are too vague and general to comply with pleading requirements in an injunction suit and Defendant is not put on sufficient notice to properly prepare its defense.

WHEREFORE, Defendant prays that the application for temporary injunction be denied, that the show cause order be vacated, and for general relief.

(s) ALLEN WOOD
of
FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

17 (s) CHESTER H. JOHNSON
of
JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas

(s) SIDNEY D. CALLENDER
of
JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

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18 **Exhibit "A" to Response to Show Cause Order**

THE STATE OF TEXAS)
COUNTY OF BEXAR) ss.

H. B. ZACHRY, President of H. B. Zachry Company, a corporation, being of lawful age, and being first duly sworn on oath, says:

That the said H. B. Zachry Company by virtue of that certain contract with the Lower Nueces River Water Supply District, a municipal corporation, is constructing a dam on the Nueces River near Mathis, Texas, a river wholly situated within the boundaries of the State of Texas. That said dam is not being constructed for the purpose of improving, enlarging, extending and reconstructing the water distribution system of the City of

Corpus Christi, Texas, and is in fact no part of said system.

That the provisions of said contract between Zachry Company and the District required that employees be paid at the rate of one and one-half times their regular rates for hours worked by them in excess of eight hours per day and for hours worked on Sunday and Zachry Company has fully complied with said provisions.

That by virtue of the requirements of Article 5159a, Vernon's Annotated Civil Statutes of the State of Texas, the District was required to, and did, ascertain the general prevailing rate of per diem wages—in the locality in which the dam was to be constructed—for each craft
19 or type of workman or mechanic needed to execute the contract. That the prevailing rates as determined by the District were specified in the call for bids and in the contract itself and Zachry Company has paid to its said employees affected by same not less than the specified rates as determined by the District.

The dam being constructed for the District by Zachry Company is purely local in nature and the work of the employees building the dam has neither a close nor an immediate tie with the process of production of goods for commerce and hence H. B. Zachry Company is not in violation of the provisions or requirements of the Fair Labor Standards Acts, as amended.

Further affiant saith not.

(s) H. B. ZACHRY
H. B. Zachry

Subscribed and sworn to before me by the said H. B. ZACHRY this the 1st day of October, 1957.

(s) GRACE C. ORSBORNE,
(SEAL) Notary Public in and for
Bexar County, Texas

GRACE C. ORSBORNE,
Notary Public, Bexar County Texas.

20 IN UNITED STATES DISTRICT COURT

**Defendant's Motion for More Definite Statement—
Filed October 3, 1957**

Plaintiff has alleged in Paragraph V of his Complaint that "Defendant repeatedly has violated and is violating * * * provisions of the Act by employing many of its employees in the production of goods for interstate commerce, * * * for work weeks longer than 40 hours since on or about December 1, 1955, without compensating said employees for their employment in an excess of 40 hours, * * * at rates not less than one and one-half times the regular rate at which they were employed."

Defendant moves the Court for an Order directing Plaintiff to file a more definite statement or a bill of particulars of the following matters:

1. The name or names of Defendant employees claimed to have been underpaid.

2. What periods of time said employees were underpaid.

3. The interstate character of the work performed by said employees referred to in 1 and 2 above.

The ground of the motion is that the above matters are not averred with sufficient definiteness or particularity to enable Defendant properly to prepare its answer in that

21 Defendant does not know whether or not Plaintiff is claiming that all, or a part, of its alleged 300 employees were underpaid from "on or about December 1, 1955", therefore, Defendant does not known nor can it ascertain, during what particularly work-weeks of this 21 month period the said employees allegedly worked in excess of said 40 hour workweek. Furthermore, because of the fact that the nature of the employer's business is not determinative but the application of the Act depends upon the character of the employees' activities, Defendant cannot properly and truthfully prepare its answer without the information sought in 3 above.

WHEREFORE, Defendant prays that said motion be granted.

(s) ALLEN WOOD

of

FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

(s) CHESTER H. JOHNSON,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,

(s) SIDNEY D. CALLENDER,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

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22 IN UNITED STATES DISTRICT COURT

Answer—Filed October 3, 1957

I.

Jurisdiction of the Court is admitted, but Defendant alleges that the Complaint does not allege a cause of action upon which the prayer for relief can be granted.

II.

Defendant admits the allegations of Paragraph III of the Complaint except states that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

III.

Defendant denies the allegations contained in Paragraph IV of the Complaint, except that it alleges that it has em-

ployees engaged in the construction work involved numbering from time to time, depending on conditions, from approximately 85 to 400, and that there are now employed approximately 87 on such job.

IV.

Defendant denies the allegations contained in Paragraph V of the Complaint.

V.

Defendant denies the allegations contained in
23 Paragraph VI of the Complaint.

WHEREFORE, Defendant prays that this action be dismissed and in the alternative that Plaintiff take nothing herein and that this Defendant go hence with its cost without day, and for general relief.

(s) ALLEN WOOD,

of

FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas,

(s) CHESTER H. JOHNSON,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,

(s) SIDNEY D. CALLENDER,

of

JOHNSON, HITE & CALLENDER,
1109 Transit Tower,
San Antonio, Texas,
Attorneys for Defendant.

24 IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Testimony

Appearances:

Counsel for Plaintiff:

MR. HARRY CAMPBELL, JR., Assistant Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 218, 1114 Commerce Street, Dallas 2, Texas.

MR. EARL STREET, Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 217, 1114 Commerce Street, Dallas 2, Texas.

Counsel for Defendant:

Messrs. Johnson, Hite & Callender, 1109 Transit Tower, San Antonio, Texas, by MR. SIDNEY D. CALLENDER and CHESTER H. JOHNSON.

Messrs. Fischer, Wood, Burney & Nesbitt, 1903 Driscoll Building, Corpus Christi, Texas, by MR. ALLEN WOOD.

BE IT REMEMBERED, that upon the trial of the above styled cause, begun on the 4th day of October, A. D. 1957, before His Honor, James V. Allred, Judge of said Court, the following proceedings were had:

25 **Colloquy Between Court and Counsel**

The Court: Be seated, Gentlemen. Good morning.

The Clerk: Civil Action Number 1645, James P. Mitchell, Secretary of Labor, versus H. B. Zachry Company.

The Court: This is a hearing on a show cause order why a temporary injunction should not be issued, restraining the defendants from violating the provisions of the Fair Labor Standards Act. Will you note your appearances, Gentlemen, in the case? Mr. Campbell, what are the initials?

Mr. Campbell: Harry Campbell, Jr. and Mr. Earl Street for the plaintiff.

The Court: And your address, please?

Mr. Campbell: 1114 Commerce Street, Dallas, Texas.

The Court: Mr. Allen Wood.

Mr. Wood: Corpus Christi, Texas, and Mr. Chester Johnson, Transit Tower, San Antonio, Texas, and Mr. Sidney Callender, Transit Tower, San Antonio, Texas, for the defendant.

Your Honor, might I present Mr. Callender to the Court? He is not admitted here.

The Court: Well, that is all right, he can serve in this case. Now, Gentlemen, I have looked over the pleadings in the case, and a little more in detail, examined
26 the complaint, and I want to ask Counsel for the Government what—I don't get the exact distinction here. The affidavit of Mr. Chandler, second and third paragraph, it says—correction, the last paragraph, that an examination of the records and so forth show, "that employees employed upon such project have been paid over time compensation, at a rate of one and one half times their regular rates, for hours worked by them in excess of eight hours per day and for hours worked by them on Sunday. They have not been paid over time at a rate of not less than one and one half times their regular rates of pay for hours worked by them in excess of forty hours in the work week, excluding the hours in excess of eight in the day or on Sunday."

Mr. Campbell: The situation is this, Your Honor. Let's assume that a man works six ten-hour days, he would be paid two hours over time each of those days for the hours in excess of eight, but he wouldn't be paid over time for the first eight hours on the sixth day. In other words, the over time involved here is that which occurred during the first eight hours on Saturday where the man had worked at least forty straight time hours earlier in the week. I was looking at the payrolls a minute ago, and they specifi-
27 cally show, as the evidence will show, that they were paid forty eight hours straight time when they worked six or more days in the week, and then over time after—

The Court: Above the forty eight?

Mr. Campbell: Yes, sir, that was the effect of it.

The Court: Well, I notice the defendant's reply here is that he was paying them at the prevailing—had to determine the prevailing wage rates under a Texas statute, and had been doing that. What I am trying to get at, what

is the difference between your investigator and Mr. Zachry on this matter, aside from the question of whether or not it is commerce?

Mr. Campbell: I don't think there is any difference. They did pay the prevailing rate as required by Texas statute. As long as that rate was more than a dollar an hour, we have no quarrel with them. They did not pay over time after forty hours, in the work week. They paid over time, actually, after forty eight hours in the work week. Now, that—

The Court: Well, in other words, what do they work, eight hours a day or ten hours a day? You gave me a situation while ago. Suppose they work ten hours a day?

28 If they work ten hours a day, four days would be forty hours.

Mr. Campbell: And they would get eight hours over time because of the hours in excess of eight in a day, but the payrolls will reflect, Your Honor, that where a man worked six days of eight hours or more per day, he was paid forty eight hours at straight time rate. Now, where he worked on Sunday, he got time and a half for that, and that is offset against the over time under the statute. We have no quarrel there. Where he was paid over time after eight hours a day, that also is to be offset against over time under the statute, and we have no quarrel there. Our differences come as to the eight hours work on the sixth day for which straight time was paid, and the payrolls will reflect they do it consistently, that this was the practice followed, they paid them forty eight hours straight time.

The Court: Is that a uniform practice now, from the books?

Mr. Campbell: Yes, sir.

The Court: Is that all employees, or what?

Mr. Campbell: Well, it is all of the construction employees, and those are the ones that we are looking to here.

29 The Court: You are not claiming that as to employees in general? In his motion for a bill of particulars, he wants to know what employees you are talking about.

Mr. Campbell: We are talking about the construction employees. Now, there were a number of employees who

were paid properly in the office, some of the others, we have no quarrel with what he did with them. Our difference arises from the construction employees and the method in which they were compensated.

The Court: All right, then, he seriously disputes the question of whether or not he is in commerce.

Mr. Campbell: Yes, sir, or there is this, this is an integral part, his work is an—put it this way, the reservoir is an integral part of the system of the City of Corpus Christi for the supply and distribution of water. That system is furnishing water to concerns engaged in production of goods for interstate commerce, and the Courts have held, including the Fifth Circuit, that utilities furnish power, fuel and water to concerns engaged in producing goods for interstate commerce are themselves producing goods for interstate commerce. Employees—and the Courts have held this, the Eighth Circuit and Fifth Circuit have held, in regard to the extension and improvement of water systems, employees improving, enlarging, extending reconstructing the water system are themselves engaged in production of goods for interstate commerce, as that term—

The Court: Employees of independent contractors?

Mr. Campbell: Yes, sir.

The Court: And doing it for the agency?

Mr. Campbell: Yes, sir.

The Court: For the utility—in this instance, the state agency?

Mr. Campbell: Yes.

The Court: Well, I am not familiar with those decisions. I don't care to get into them now, I am trying to find out what the points of difference between you are, and whether or not this motion for a bill of particulars should be granted. If they know what employees you are talking about, and it is all of a certain class, I don't see any reason to particularize it, offhand. I will hear from them in a moment. I am impressed with the argument to issue a temporary injunction and dispose of the case on its merits.

Mr. Campbell: We are prepared to go to trial on the merits.

The Court: Well, they are not. I imagine—people usually want about twenty days on that, anyway, and they haven't had it.

31 Mr. Campbell: Here is the problem as we see it, Your Honor. If we are right on our theory of the coverage angle on this, they have been underpaying a substantial number of employees for a period of twenty one months. That is in excess of seventy-thousand dollars that the employees—

The Court: That is a good, solvent company?

Mr. Campbell: Yes, sir.

The Court: I know these workers want the money if they can get it, especially when the job plays out.

Mr. Campbell: Now they say in their response that they wanted to preserve the status quo. In other words, they want to preserve the status quo by continuing to violate the Federal statute.

The Court: I will let you argue it in a minute, I just want to try to get the difference between you, and I will hear from them. I believe I will let them, in view of the statement you have made—I want to see if we can't get down to—eliminate this question of the bill of particulars, which ordinarily might be good, but if it is all of a certain class, and if it is a question of whether they are in commerce, I don't see any necessity, offhand, for a bill of particulars. I would be glad to hear from you gentlemen now, in view of the clarifying statement, if it is clarifying,

32 that Counsel has made.

Mr. Wood: Your Honor, we don't have much to add to what we wrote in our response to appear and show cause. We thought that what we said in that motion was correct, and the usual procedure, and that the purpose of a temporary injunction, normally, certainly is to preserve the status quo, rather than to change it as a temporary injunction would do here; and we also thought that a temporary injunction had for a purpose, not the disposition of the case on the merits, as a ruling adverse to Zachry Construction Company would have here. The only difference between that judgment and the final judgment would be that the one was interlocutory and the other was final. They would resolve exactly the

the same ultimate issues of fact and law, and we don't think—I understand, of course, that the Court can go ahead and hear these matters anyway, but we think the practice and purpose of this sort of a hearing is not to do either one of those things, not to change the status quo on the one hand and not to resolve the controversy on the merits, actually on the other. Now, as we point out in here, Your Honor, and as the Court noted, the Zachry Company, we think, is a solvent company, and if it turns out in the final analysis that this money should be paid these employees, why they will have their
33 rights against him. On the other hand, as we say—of course, this is pleading, it is not proof, but I think everybody knows that these workers are itinerant, they follow construction jobs from time to time, and if a payment is made to them under order of a temporary injunction and it turns out on the merits that that was improperly granted, there is no way for the contractor to get it back, or really even try to get it back, and I understand he would make no effort to. In the first place, he couldn't run people down, wherever they happened to be. In the second place, if some old, faithful employee who spent the money, it would be very bad employee-employer relations to go say, "I have overpaid you a little bit, let me have it back;" and a ruling against us at this stage of the game on those ultimate issues that would be on the merits would put us in that position, and we can't see that it would prejudice the Department of Labor, really, to try the thing on the merits. Now, this is argument, pure and simple, but from the affidavit that Your Honor referred to there, it develops that Mr. Chandler investigated this matter in March of this year, and evidently he must have had enough uncertainty about it—of course I don't know what the situation was, but he investigated it in
34 March and didn't file this lawsuit until September, and of course, they knew the job was progressing, and now it is practically completed, as I understand it, maybe 98 per cent completed. So we think it would be a useless and unnecessary proceeding to have a full-scale hearing here on a temporary injunction that would later have to have another trial on the same issues, identical same issues on the merits, that it is not necessary and not a

good expenditure to the parties' time, the Court's time or anybody else's time. Now, of course, we contend, and I am not, Your Honor, a labor lawyer or expert in the field at all, but we contend basically on the facts that this is a local project, that this dam that is being constructed is new construction, that it is not in the sense of the statutory language as they say here in the pleading, that it will improve, enlarge, extend and constitute a reconstruction of the water distribution system. They don't say "supply system," they say "distribution system," and we don't think that is true in the first instance, and in the second place, our contention is that even th ugh the water does come from the reservoir that will be created here down the stream of the river into the filtration plant at Calallen and later into the mains and lines, and goes to people who make things for interstate commerce, that the operation is too remote anyway to put our people in commerce or the production of goods for commerce. That, of course, is on the merits, and I want to call the Court's attention to one of those things that streses what I am trying to say, and that is what Judge Frankfurter said in one of these cases. He said that trying to interpret this law and apply it to a given fact situation was—no, I will back up. Here is what he said, he said that to try to lay down a general principle or controlling principles that are applicable to the application of this law is as rewarding—this is his langauge, now, "is as rewarding as an attempt to square a circle;" that every fact situation stands on its own basis, that it is controlled, and the law applied to it on the basis of the exact detail fact situation existing there. So I just merely mentioned that to ill strate and emphasize the fact that really this preliminary thing would be, in effect, a final disposition of the case so far as we are concerned.

The Court: Well, Judge, in view of the fact that the administrator has—someone for the administrator has said that they are talking about the construction employees as a class, not other groups of employees, now is there a necessity for a bill of particulars now as to the employees? You know who he is talking about, it is all of your construction employees, I guess. The

information, I would think, would be peculiarly within your knowledge. In other words, it is just a general principle they are contending for, and you are contending to the contrary, and the amounts and so forth would be a matter for later action.

Mr. Wood: Mr. Callender says that if that is their position, that it is all of the construction workers, that's sufficient to satisfy the requirements that we asked for.

The Court: All right. Now, I would hesitate—I will be frank with Counsel, I would hesitate to issue a temporary injunction. It would have to be a pretty strong case, of course it should be, wherein the case is going to have to be tried on its merits. Of course, if we go to trial on the temporary injunction and try it out—usually it is tried out fairly thoroughly on temporary injunction, and it would really dispose of it on its merits anyway.

Mr. Wood: Well, Your Honor, we are not ready to announce on the merits yet, though we have no disposition to delay it unduly, I will put it that way.

The Court: I suppose the main thing to hear evidence on at this time would be the nature of this project,
37 try to determine whether or not the work is in commerce; and offhand, I haven't read any of these cases that he is talking about, and that you may have in mind. Offhand, of course, the average lawyer, I should think, and the average judge would regard construction work on a dam as being of a local nature; but some decisions, and there have been a few, we think are clearly local, have gotten into commerce under some decisions. I suppose that what I should hear, then, is evidence as to the nature of the project and as to the reason for why I should issue a temporary injunction, which does, in effect, dispose of the case on its merits. I had intended to call attention earlier to the fact that the investigator made the investigation—that has been going on since 1955. The investigator made the investigation in March of 1957, and here in September I am asked to issue a temporary injunction. How much longer is the project going?

Mr. Wood: Your Honor, I believe, under the contract with the City, Mr. Zachry has until December 31st of this year to complete the construction. I might say this, Your

Honor, in the event an injunction is issued, why, we will want to try it on its merits later.

The Court: All right,—

38 Mr. Wood: Of course, what I am thinking about is, if it is granted.

The Court: I might—you know judges have announced they were going to issue a temporary injunction, then stay it. That has been done, so it can be passed on on appeal. So I imagine when we have a hearing, it is going to dispose of it on the merits.

Mr. Wood: Your Honor, my thought is that we should have one hearing, because it does involve the same ultimate issue.

The Court: That is always the judge's thought too. That is what I am getting at.

Mr. Wood: Our thought is that we should have the hearing on the merits at a time when we can be prepared and ready for it, and that will dispense with the hearing now. But, if we can't, why, we can't, of course. That was our thought.

The Court: Well, since the plaintiff is here and the burden is on them, I will hear the evidence that they have, then consider further delay, if it is necessary. I may be able to hear enough evidence to determine, preliminarily, whether or not, from the facts, or get some facts in the light of which I can read these cases and see whether or not it is commerce. All right, it will not be neces-

39 sary at this time to put on any evidence about the rates of pay and who they have not paid and so on, in view of the fact that the defendants are familiar with what you are contending. There is no real dispute except the construction to be placed on it in view of the state statute and Federal statute, all of it depending on whether or not they engaged in producing goods for commerce.

Mr. Wood: Your Honor, do you prefer we all sit over there wh re we can talk to the witnesses, or—

The Court: Just whatever you all want to do is all right. Yes, you will be a little closer. All right, let all the witnesses you want sworn be sworn.

(Whereupon all witnesses present in the Courtroom were sworn.)

Victor Jaeggli.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Please state your name and address. A.
40 Victor Jaeggli, Corpus Christi, Texas.

Q. By whom are you employed, Mr. Jaeggli? A. Lower Nueces River Water Supply District.

Q. And what is your position? A. General Manager.

Q. Do you have custody of the records?

The Court: What is the title of that, Lower Nueces what?

A. Lower Nueces River Water Supply District.

Q. As General Manager, do you have custody of the records of the district? A. Yes, I do.

Q. I will ask you, Mr. Jaeggli, if you have brought with you, in response to a subpoena duces tecum, a copy of the contract between the district and the City of Corpus Christi? A. Yes, sir, I do have.

Q. And did you bring with you a copy of the design and bond issue preliminary report? A. Yes, sir.

Q. And a copy of the bond election order? A. Yes.

Q. And a copy of the prospectus furnished purchasers of the bonds? A. Yes, sir.

41 (Whereupon Plaintiff's Exhibits Nos. 1, 2, 3 and 4 were marked for identification.)

Q. Mr. Jaeggli, how long have you been associated with the water district? A. Approximately five and a half years.

Q. Has that been substantially since it was organized? A. No, I came with the district in May of 1952, and the district was created by the Legislature in 1949.

Q. When was the first bond election held? A. The first bond election was for a series of water wells held prior to the time I joined the district, in 1950 or 1951. The bond order that you have is for the initial issue of fifteen million five for the construction of the dam itself.

Q. Yes, sir. Handing you what has been marked as Plaintiff's Exhibit No. 1, will you please state what that

is? A. It is a water contract between the Lower Nueces River Water Supply District and the City of Corpus Christi.

Q. Handing you Plaintiff's Exhibit No. 2, will you state what that is, please, sir? A. It is a summary report
42 on the preliminary design and bond issue estimate, as prepared by the consulting engineers, for the district.

Q. And Plaintiff's Exhibit No. 3? A. The bond election order passed on the 6th day of November, 1952, calling for an election on $15,500,000.00 in bonds.

Q. And Plaintiff's Exhibit No. 4? A. This is—you described this as a prospectus a minute ago; it is a preliminary circular on six million five hundred thousand dollars in bonds sold by the Lower Nueces River Water Supply District in January of this year.

Q. Is that the only circular, the only such circular that was issued to prospective purchasers? A. We have never issued any ourselves as a district. I think possibly the First National Bank has issued a larger prospectus, but I do not have a copy of it.

Q. That is the only circular the district issued? A. That's right.

Mr. Campbell: We offer in evidence, if the Court please, Plaintiff's Exhibits 1 through 4.

Mr. Wood: Your Honor, we have no objection to No. 1, that is the water contract between the City and the
43 district. Now, the engineering report, No. 2, of course that is hearsay, and it may be admissible for some purposes, but we object to it, if it is offered for showing the truth of matters asserted in it, as being hearsay.

The Court: All right, I will carry the objection along with the case.

Mr. Wood: And the bond election order, we have no objection to that. The prospectus, put out by somebody, of course, we object to that as being hearsay if it is offered for the truth of legal matters asserted in it.

Mr. Campbell: Well, Plaintiff's Exhibit No. 4, Your Honor, he says is the only circular put by the district.

The Court: I will carry the objections along with the case.

Mr. Wood: You didn't say that that circular was put out by the district, did you?

The Witness: No, sir, it was not put out by the district.

Mr. Campbell: Exhibit No. 4 was not put out—

The Witness: Was not put out by the district.

44 The Court: He said it was the only prospectus, on bonds issued by the district, of what it meant, but if wasn't put out by the district.

Q. Now, Mr. Jaeggli, do you have a picture showing the dam site of the Wesley E. Seale Dam? A. Yes, sir.

(Whereupon Plaintiff's Exhibit No. 5 was marked for identification.)

Q. Handing you what has been marked as Plaintiff's Exhibit No. 5, I will ask you to state what that is. A. An area photograph, taken on May 2, 1957, showing the new Wesley Seale Dam under construction, and also showing the old dam upstream from it.

Q. Is the old dam on your right as you look at the picture? A. Yes, it is.

Q. Is that a fair representation of the relationship between the two structures? A. It is.

Q. You are familiar with the site? A. Yes.

Mr. Campbell: We offer Plaintiff's Exhibit No. 5, Your Honor.

45 Mr. Callender: We have no objection.

The Court: All right.

Q. Now, Mr. Jaeggli, are you familiar with the specifications of the new reservoir that will be backed up by the Wesley E. Seale Dam? A. Yes.

Q. What will be the capacity of that reservoir? A. Slightly over 300,000 acre feet.

Q. Do you know what the capacity of the former Lake Corpus Christi was?

The Court: How many acre feet?

The Witness: Three hundred thousand. A. The present reservoir has a capacity of approximately 34,000 acre feet.

Q. So it will be an increase of approximately ten times in capacity? A. That's correct.

Q. Is that water to be used for any purpose other than furnishing water to the Corpus Christi Water Department? A. Our contract with the City of Corpus Christi

provides that all of the water that is impounded by the Wesley E. Seale Dam will be sold to the City of Corpus Christi.

Q. What will be done with the old dam when the
46 new one is completed? A. It will be inundated by the new lake.

Q. Will it be breached? A. A portion of the embankment on the old dam will be lowered. I think that is to the extent which we do any work on the old dam.

Q. How far downstream is the new dam from the old one? A. Varying from about thirteen hundred feet to fifteen hundred.

Q. Do you know how near completion the dam is? A. Approximately 95 per cent complete.

Q. Can you tell the Court what remains to be done to complete it? A. Certain concrete work downstream from the south spillway, addition of fill work of approximately, I would say, a hundred and sixty thousand cubic yards.

Q. I understand also that the riprap is to be placed on the face of the embankment? A. Substantially all of the riprap has been placed. There is a little additional riprap to be placed.

Mr. Campbell: That's all. You may cross examine.

47 Cross Examination

By Mr. Callender:

Q. Mr. Jaeggli, have you told us that you work for the water district? A. That's correct.

Q. Are you paid wholly by the district, your pay, your salary? A. Correct.

Q. Are you familiar with how the district was created? A. Yes, sir, I am.

Q. Will you tell us about that? A. The district was created by a special act of the Legislature in 1949 as a water control and improvement district, operating under the general law of 7880.

Q. Does that law set out the powers that the district, or the things that the district can do, set out specifically what you can do? A. It does.

Q. Does it set the boundaries of your district? A. It does.

Q. The land is encompassed by the district?

The Court: There is a little lawsuit over the boundaries.

48 Q. Is all that land situated in the district within the State of Texas? A. It is.

Q. Is the district itself in any way related to the City of Corpus Christi, or are they both separate entities? A. They are separate governmental agencies.

Q. Is the district a municipal corporation, is that the designation? A. Yes, it is.

Q. Are you familiar, Mr. Jaeggli, with the distance that the new dam, by river miles, how far is that away from the treatment plant at Calallen? Do you know in river miles? A. By river miles, approximately 26, I believe, in river miles.

Q. And how far—26 river miles from the treatment plant at Calallen to the dam? A. Right.

Q. Do you know how far it is from Calallen, where the treatment plant is, to the city limits of Corpus Christi? A. Some 16 miles. The treatment plant is not in the City of Corpus Christi,—

49 Q. At Calallen. A. —it is at Calallen.

Q. Now, Mr. Jaeggli, in order for the district to have operating capital, you told us, I believe, that they issue bonds, is that correct? A. That's correct.

Q. Now, prior to the time that you issued these bonds, did you have an election? A. We did.

Q. And who voted in regard to this election? A. The qualified tax-paying voters within the boundaries of the district.

Q. Just those situated within the boundaries of the district, is that correct? A. That's correct.

Q. You submitted that proposition to the local voters and they voted on it, is that correct? A. That's correct.

Q. Now, after the bonds were approved, you sold some of the bonds, is that correct? A. That's correct.

Q. Now, how, Mr. Jaeggli, will those bonds be paid off? A. First, the bonds are unlimited tax bonds.

The Court: How much bonds did you sell?

A. We sold fifteen million five for the construc-

50 tion of the dam. Those bonds are unlimited tax bonds. However, we plan to retire them with com-

bination tax and revenues from the sale of water. We are now levying a tax of 20 cents per hundred dollars valuation.

Q. You mean the tax would be levied on the local inhabitants situated within the district? A. That's correct.

Q. And from this tax, you will get revenue with which to retire the bonds? A. Well, I haven't quite made myself clear. We have two sources of revenue, one from the tax, the other from the sale of water to the City of Corpus Christi, or rather, it is not exactly the sale of water, because we impound the water for the City of Corpus Christi.

Q. In other words, what I am getting at, there is no outside capital coming from any other place other than the residents of this district? A. That's correct.

Q. Do you know, as a matter of fact, whether or not the new dam is in any way connected with the old dam? A. No, it is not.

51 Q. It is not? A. No.

Q. Do you know, Mr. Jaeggli, the population of the City of Corpus Christi? A. Approximately 165,000.

Q. Now, can you tell us, please, sir, the population, if you know, of the inhabitants within the confines of the district? A. Approximately 200,000.

Q. Do you know, of your own knowledge, whether the Nueces River is wholly situated within the boundaries of the State of Texas? A. Yes, it is.

Q. It is. And the water shed, which furnishes water for the lake, that too is situated wholly within the state, is it not, the State of Texas? A. It is, yes, sir.

Mr. Callender: That's all. Thank you, sir.

Redirect Examination

By Mr. Campbell:

52 Q. Mr. Jaeggli, when you say the new dam is not connected with the old, you mean physically attached to the old, is that right? A. That's correct.

Q. Why was the new dam located where it was? A. Our construction engineers reported that this particular site was one of the most economical sites on the Nueces River for the construction of the dam.

Q. Was consideration given to raising the heights of the old dam? A. Not by our present engineers. I understand that it happened before I came to the district, but I can't testify on that myself.

Q. Now, aside from the financial and legal details of organization of the district, what was the purpose of the construction of the Wesley E. Seale Dam; what was it intended to do? A. To provide a dependable water supply for Corpus Christi and vicinity. I mean by that, the general Coastal Bend area.

Q. In other words, it was necessary to increase the amount of water available to the City as it grew? A. Yes, it was.

Mr. Campbell: That's all.

53 Mr. Wood: May I just ask him one question, Your Honor?

The Court: Yes.

Further Cross Examination

By Mr. Wood:

Q. Mr. Jaeggli, did the fact that the old dam is located where it is have anything to do with the decision to locate the new dam where it is? A. No, I don't believe so, other than reflecting that that particular site was a natural site, that area was a natural site for the dam. That is the only thing.

The Court: Do you mean by the fact that the old dam was located where it was, it was so evident, of course, that this general area was the proper site for the new dam?

A. That's correct.

The Court: That is the reason the old dam was put there in the first place, it just wasn't big enough as it turned out, and you needed some more water?

A. That's right.

54 Q. But the mere fact that the old dam happened to be there, that fact in and of itself had nothing to do with the decision to put the new dam where it is? A. None whatsoever.

Mr. Wood: That's all.

The Court: All right, you may be excused.

Mr. Campbell: Your Honor, I would like to excuse these witnesses that testified. They are all busy men and have given their time—

The Court: All right, I have just said he may be excused.

Owen S. West.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. State your name and address, please, sir. A. Owen S. West, City of Corpus Christi.

Q. By whom are you employed, Mr. West?
55 A. By the City of Corpus Christi.

Q. In what position? A. Utilities Office Manager for the Public Utilities Department.

Q. As Office Manager of that department, do you have custody of the records of the City Water Department? A. Part of them, yes, sir.

Q. In response to a subpoena duces tecum, have you brought with you certain summaries of sales by the City Water Department, covering the period since about December, 1955? A. Yes, sir.

Q. Will you produce those, please?

(Whereupon Plaintiff's Exhibit No. 6 was marked for identification.)

Q. Mr. West, handing you what has been marked for identification as Plaintiff's Exhibit No. 6, I will ask you to state if those are the full, true and correct copies of records, official records of the City Water Department? A. Yes, sir, they are.

Q. And what do those records reflect? What do they cover? A. These records cover the monthly sta-
56 tistics on the number of customers and consumptions and revenue broken down into residential, commercial, seasonal, hospitals, schools, churches, city and industrial inside and outside the city limits.

Q. And it covers the period from the month of December, 1955, through the month of August, 1957, is that correct? A. Yes, sir.

Mr. Campbell: We offer Plaintiff's Exhibit No. 6 in evidence.

Mr. Callender: We have no objection.

Q. How long have you been with the Public Utilities Department, Mr. West? A. Since July of 1955.

Q. Have you been familiar with the customers of the Department during that period? I don't mean to say that you know all of the details, but you know generally who they sell to? A. Yes, sir.

Q. Do they sell to railroads here? A. Railroads, yes, sir.

Q. Do they sell to the telephone company? A. Yes, sir.

Q. Western Union? A. Yes, sir.

57 Q. Do you furnish water to the airport? A. Yes, sir.

Q. Do you have any truck companies that purchase water from you, that you know of? A. That is transportation companies?

Q. Yes, sir. A. Yes, sir.

Q. Do you know the purpose of the construction of the Wesley E. Seale Dam? A. Yes, sir.

Q. What is that purpose?

The Court: Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area.

Mr. Wood: May I make one observation? The allegations are, in Paragraph 4, that these people are working on a project which will enlarge, improve, extend and constitute a reconstruction of the Corpus Christi Water Distribution System. Now, our thought is just this, that, of course, the facts are admissible, whatever they are, but in this particular case, it may be, and we lean to the opinion that those things constitute conclusions, to

58 ask a witness, "Does that enlarge it, or does that constitute a reconstruction of it?" Ordinarily, it wouldn't be, but right here, inasmuch as that possibly is one of the ultimate issues that bears on it, that that would be a conclusion; and we think it is all right to ask him what the purpose was, perhaps, if he knows. Of course, Mr. Jaeggli has answered it already once.

The Court: Well, that is the advertised purpose, and we voted for it, to get an adequate water supply for this

area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here; and frankly, we wanted a real bigger dam, but, if I recall right, the Governor, at that time, said that we were planning too big a dam and it would furnish more water than this Gulf Coast area could ever think about using, and we didn't get that, and this dam was a substitute. That is my recollection about it. It reminds me of back in 1918 when they built Lake Worth at Fort Worth. The opposition there said it would furnish more water than they could ever use in the foreseeable future, and I believe they are still fighting for more water up there, although I believe they built two or three more lakes. All right.

Q. Mr. West, does the Water Department have any source of water besides the Lake Corpus Christi? A. Yes, sir, they do.

Q. What is that, wells? A. Yes, sir.

Q. What percentage, if you know, of the total water is produced in those wells? A. I can't say exactly, I don't believe, right now.

Q. Can you give us an estimate from your knowledge of the Water Department operations? A. I would be afraid to say without looking at the records.

Q. Would it be an appreciable percentage after this Wesley Seale Dam is completed? A. After the new dam is completed?

The Court: Uh huh.

A. It will not be used at all, it will be a stand-by.

Mr. Campbell: You may cross examine.

Cross Examination

By Mr. Callender:

Q. Mr. West, you said you sold water to railroads. You do not know what they use the water for? A. No, sir.

Q. You sell them drinking water, of course? A. Certainly.

Q. The telephone company buys water with which to drink, don't they? A. I don't know what they use it for.

Q. These transportation trucks, what about those? A. The trucks or companies?

Q. Yes. A. Well, I don't know what they use it for. I imagine for drinking water, or whatever else they use it for.

Q. And you don't know where they go with it, do you? A. No, I don't.

Mr. Callender: That's all. Thank you, sir.

Mr. Campbell: Thank you, Mr. West.

61 **John E. Paspahala.**

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name and address? A. John E. Paspahala, Great Southern Chemicals.

The Court: How do you spell that last name?

A. P-a-s-p-a-h-a-l-a.

Q. You live here in Corpus Christi? A. Yes, sir.

Q. What is your position with the Great Southern Chemical Company? A. My title is Assistant Comptroller.

Q. Are you familiar with the operations of that concern? A. I am, sir.

Q. What does it produce? A. Well, our major products are aromatics.

Q. Would that be benzene, toluene and xylene? A. Benzene, toluene and xylene, yes, sir.

Q. Where does the company sell its products? A. Well, we sell our products all over.

62 Q. Both inside and outside—

The Court: There is no dispute that that company sells its products in interstate commerce?

Mr. Callender: No, sir.

The Court: And practically all the major industries in this area. Isn't that conceded, Gentlemen?

Mr. Callender: Yes, sir.

Mr. Campbell: Thank you, sir.

Q. You purchase water from the City of Corpus Christi? A. We do, yes, sir.

Q. What are your normal monthly requirements, on the average? A. I would estimate around 20,000,000 gallons a month.

Q. And how is that water used by the company, outside of for drinking and sanitary purposes? A. Well, sir, I can

give you a layman's opinion on how it is used, but a process engineer would be more appropriate to ask that question.

Q. Let me phrase it this way. Mr. Paspahala, you have seen the plant? A. I have, sir.

Q. Do they have steam boilers there for the pro-
63 duction of power? A. Yes, sir.

Q. And water is used in those boilers? A. Yes, sir.

Q. Do they have cooling towers and condensation towers? A. Yes, sir.

Q. Is water used in connection with those?

The Court: I don't think the details of how the water is used—I think it is common knowledge that these industries use various quantities of water for the very purposes you are outlining.

Mr. Campbell: Well, it is a necessary part of our record, Your Honor. While we are offering this testimony now, we have a number of additional witnesses we took depositions of in connection with another proceeding. I would be very happy to shorten this and offer the depositions.

The Court: Well, I don't see any reason for cluttering up the record here. There is no dispute that these industries use a large quantity of water, is there?

Mr. Wood: Judge, I think that is absolutely correct. The only thing is what they do with the water, what
64 use they do make of it, whether the water is a part of the product that they sell, or whether it is just used—

The Court: It is not part of the product, it is used for cooling towers and engines and so forth.

Mr. Wood: So far as I know, none of them are part of the product, but—

The Court: So far as I know, none of them are. Do you know of any that water is a part of their product?

A. No, sir.

The Court: Any appreciable part of the product?

A. No, sir.

Mr. Campbell: I am sure they try to keep it out of their petroleum products.

Mr. Wood: Your Honor, further than that, we don't know of any industries who sell water outside of the state, the water itself.

Mr. Campbell: We don't contend that.

The Court: Well, I don't think there is any dispute about the general picture, it is a question of whether or not you get back up here and these dam workers on the Wesley Seale Dam are covered by this act.

65 Mr. Campbell: Well, I would like it understood, Your Honor, that the additional witnesses I have will testify substantially the same as this gentleman has.

The Court: Well, that is admitted, and it is admitted that—you have got the number of industries in this area, I am sure, covered by this breakdown here, and it is admitted they use a substantial amount of water in connection with their production of goods, a substantial portion of which move in commerce.

Mr. Campbell: That's all. Thank you.

Mr. Wood: Your Honor, the defendant will stipulate to that for this hearing, of course.

The Court: Yes.

Mr. Campbell: I would like to excuse, then, Your Honor, all these witnesses who were subpoenaed to testify along those lines.

The Court: All right.

Mr. Callender: May I ask the witness one question?

The Court: All right.

66 Cross Examination

By Mr. Callender:

Q. You said you buy water from the City of Corpus Christi, is that right? A. Yes, sir.

Q. You do not buy any water from the Lower Nueces River Supply District, do you? A. No, sir.

Q. You have no contract with them at all? A. No, sir.

L. C. Chandler,

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name and address, please? A. L. C. Chandler, San Antonio, Texas.

Q. Are you employed by the Wage and Hour Public Contracts Division of the United States Department
67 of Labor? A. I am.

Q. What is your title, please? A. Investigator.

Q. Did you make an investigation of the construction work being carried on by H. B. Zachry Company near Mathis, Texas? A. I did.

Q. About what time did you open that investigation? A. Some time around March of this year.

Q. Did you do—when did you finally complete your work on that investigation? A. It took about two weeks, I believe, in other words to complete my work on that.

Q. Then didn't you return to do some additional work? A. Yes, sir.

Q. At the conclusion of the first part of your investigation, did you hold a conversation with any representatives of the H. B. Zachry Company? A. I did.

Q. What representatives did you confer with? A. I first talked to Mr. Cavazos, and he later called in Mr. Johnson, their attorney.

The Court: Who is Mr. Cavazos? What is his title?
68 A. Secretary and Treasurer, I believe.

Q. Did you advise Mr. Cavazos of your findings? A. I did.

Q. Did you ask him to come in compliance with reference to the construction workers on the—

The Court: What did you tell him you found? Haven't you got something about that? Do you have a summary of what your findings were? Did you just tell him verbally? A. I told him that they were not paying time and a half after forty hours. In other words, they were paying time and a half after eight hours in a day, time and a half for their Sunday work, but the Saturday work was paid at straight time, even though the employees had previously worked forty hours up until the Saturday work.

Q. Did you advise him it was the position of the Department of Labor that the work was subject to the Fair Labor Standards Act? A. I did.

Q. What did he have to say? A. Well, he called in Mr. Johnson. In other words, he said he couldn't answer, he called in Mr. Johnson.

Q. Then you later conferred with Mr. Johnson
69 and Mr. Cavazos? A. That's right.

Q. What was their answer to your request that they come in compliance? A. They weren't going to comply with the law.

Mr. Campbell: That's all.

Cross Examination

By Mr. Callender:

Q. Now, Mr. Chandler, did you say they told you they were not going to comply with the law? A. That's right.

Q. They didn't tell you that in their opinion they were not covered by the law? A. That was their position, yes.

Q. That they were not covered, isn't that right? A. That's right.

Q. And not just an outright statement, "We are not going to comply with the law," they didn't say that, did they? A. That's right.

Q. All right. Now, as a matter of fact, Mr. Chandler, of your own knowledge, do you know, as a matter of
70 fact, that this reservoir up there is a part of the distribution system for water in the City of Corpus Christi? Do you know that of your own knowledge? A. Not of my own knowledge.

Q. Not of your own knowledge, do you? A. No.

Mr. Callender: That's all. Thank you, sir.

The Court: Wait a minute.

Mr. Campbell: That's all. Mr. Johnson, I request the production of the contract between the Lower Nueces River Water Supply District and the defendant here.

(Whereupon Plaintiff's Exhibit No. 7 was marked for identification.)

Mr. Campbell: Your Honor, before examining this witness, I want to offer in evidence the contract between the Lower Nueces River Water Supply District and H. B. Zachry Company as Plaintiff's Exhibit No. 7, and I am sure the defendant will wish to withdraw and submit copies, and we, of course, have no objection.

The Court: All right.

71 **Amado Cavazos,**

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Campbell:

Q. State your name and address, please, sir. A. Amado Cavazos, 302 Windale, San Antonio, Texas.

Q. You are employed by H. B. Zachry Company, Mr. Cavazos? A. Yes, sir.

Q. What is your position? A. Treasurer.

The Court: What?

A. Treasurer.

Q. Are you familiar with the compensation practices being carried on in connection with the construction of the Wesley E. Seale Dam near Mathis, Texas? A. Yes, sir.

Q. What are those practices as being carried on now? A. The payment of the rates as specified in the contract.

Q. How about over time? A. The contract

72 specifies over time after eight and on Saturday.

Q. Eight hours a day? A. I am sorry, on Sundays.

Q. But you are not paying over time on the first eight hours on Saturday, is that correct? A. That's correct.

The Court: They work eight hours a day?

A. Sometimes they work more than eight hours a day, Your Honor.

The Court: Well, as a regular thing, it is eight hours a day, six days a week, is that it?

A. Some of them work ten hours a day, six days a week.

Q. You still are not paying over time after forty hours of work week? A. Not as such.

Mr. Campbell: That's all. You may cross examine.

The Court: There is no dispute about that.

73 Cross Examination

By Mr. Callender:

Q. Mr. Cavazos, is it true that these workers who work on such jobs as this are itinerant in nature and move from job to job?

Mr. Campbell: I object to that, Your Honor, as wholly immaterial?

The Court: Overrule.

Q. Is that a fact, that they are itinerant and move from job to job? A. Am I supposed to answer it?

The Court: Yes, sir.

A. A large majority, yes.

Q. And do they move from state to state? A. Well, I would just presume that some of them do, the people who follow construction in general.

Q. Now if the temporary injunction is granted, and when—

The Court: I think I can answer that better than he can, Counsel.

Mr. Callender: I was going to ask him, Your Honor, if he would try to get the money back in the event, on the merits, the Court determined coverage.

74 The Court: Well, all right. I beg your pardon.

Q. In the event that the company pays the employees over time, and it is eventually determined by the Court that the act is not applicable, would you attempt to recover that money back? A. The decision wouldn't be up to me personally, it would be up to probably Mr. Zachry or the Board, but I don't think so.

Q. In your opinion, would it create a distasteful employer-employee relationship? A. I cannot imagine that the company would do such a thing.

Mr. Callender: Thank you, sir.

The Court: All right.

Plaintiffs Rest

Mr. Campbell: The plaintiffs rest, Your Honor.

Mr. Wood: May we have just a moment, Judge?

The Court: All right, we will just take a fifteen minute recess, if you like.

(Whereupon a short recess was taken, after which the following proceedings were had.)

75 The Court: Anything further from the defendant?

Defendant Rests

Mr. Callender: Your Honor, the defendant rests also.

Colloquy Between Court and Counsel

The Court: All right. Counsel, when can you have a brief ready on this?

Mr. Campbell: I have a brief ready right now, Your Honor.

The Court: All right, deliver copies to Counsel, and you gentlemen, how long do you want to reply?

Mr. Callender: May we have a week or ten days, Judge?

The Court: You can have a couple of weeks. Then, I will give the Government one week to reply. Will that be sufficient?

Mr. Campbell: Yes, sir.

The Court: And the case will be submitted three weeks from today. That will be—we will put it three weeks from Monday. That will be the 28th. Monday is the 7th. I will be gone the week of the 21st, anyway. I will be in Laredo and I don't have a library there, so it will be submitted October 28th on motion for preliminary injunction.

76 Mr. Campbell: Your Honor, I would like to call the Court's attention to one case I did not cite in the brief, and that is Tobin versus Raney, 205, Federal Second, 606, Fifth Circuit Decision.

The Court: All right, just note that on the cover there, Mr. Clerk. I want you gentlemen to consider, now, the possibility of submitting it on its merits also. It might be that you want to submit it on the merits. I don't see much more that can be developed. All right. Thank you, Gentlemen. Court will stand recessed pursuant to the rule.

77 (Reporter's Certificate to foregoing transcript omitted in printing.)

78 IN UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

**Court's Memorandum Decision—December 10, 1957—
Filed December 12, 1957**

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FOR PLAINTIFF.

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Corpus Christi, Texas,

CHESTER JOHNSON
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SIDNEY D. CALLENDER
1109 Transit Tower
San Antonio, Texas,

FOR DEFENDANT.

Action by the Department of Labor against defendant, a Texas corporation, for preliminary injunction to restrain violation of Sec. 15(a)(2) of the Fair Labor Standards Act (U.S.C., Title 29, Section 201 et seq.), by failure to pay time and one half to its construction employees for all work in excess of 40 hours per week. Evidence was presented before the court on October 4, 1957 on an order to show cause why preliminary injunction should not issue as prayed.

79 Defendant is engaged in the construction of the new Wesley E. Seale dam, thus creating a new reservoir, on the Nueces River near Mathis, San Patricio County, Texas. This work is being done under contract with the lower Nueces River Water Supply District, a

conservation and reclamation district, created by special act of the Texas Legislature, Art. 8280—134 Vernon's Texas Civil Statutes, the validity and powers of the District having been upheld by the Texas courts.[1]

The material facts are not in dispute. Defendant pays its employees time and a half for all hours in excess of eight each day and for all hours worked on Sunday but not in excess of 40 hours per week.[2] Plaintiff contends that defendant's employees are engaged in commerce "in that the said dam and reservoir . . . are designed to and will improve, enlarge, extend and constitute a reconstruction of the water district system of the city of Corpus Christi, the said system regularly furnishing substantial quantities of water for use in the manufacture of goods to be shipped in interstate commerce." Defendant
80 contends that its employees are not so engaged in the production of goods for commerce within the meaning of the act because:

(1) Defendant is building the dam under contract, not with the City of Corpus Christi, but with the District, created as a separate and independent state agency by the legislature under the Conservation Amendment to the Texas Constitution, sec. 59, Article 16;

(2) The dam being built and the reservoir created thereby, will belong to the District, not the city, the water being sold under contract by the District to the city, after it is released by the District at the dam and comes 26 miles down the Nueces River before it arrives at the city's treatment plant at Calallen, Texas; thereafter it is distributed by the city, in its own and separate distribution system, to its customers, domestic and industrial.

(3) In any event, defendant's construction workers are not covered by the act.

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[1] Lower Nueces River Water Supply Dist. v. Cartwright (Tex. Civ. App.), 274 SW(2) 199, error ref. n.r.e.

[2] For instance if employees work 10 hours per day for six days, (including Saturdays), a total of 60 hours, defendant only pays them for 12 hours overtime.

The contracts between defendant and the District on the one hand and the City of Corpus Christi and the District on the other have been introduced in evidence. While
81 defendant is an independent contractor, contracting with the District, a separate and distinct political entity from the city, consideration of both contracts and the complete picture presented by the evidence clearly discloses that the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city.[3] The new dam is being built 1300 to 1500 feet down stream from the old. A substantial amount of the water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce. It largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce.

It is settled that employees of concerns regularly supplying goods essential to the functioning of interstate instrumentalities and interstate producers are within the act, such as concerns manufacturing or producing materials for construction of interstate highways.[4] In Mitchell v.
82 Vollmer, 349 U.S. 427, the court held not only that repair of the facilities of interstate commerce was within the act but improving existing facilities as well. There employees engaged in the construction of an alternate lock and canal to form a part of the Gulf Intercoastal Waterway were engaged in commerce and covered by the Fair Labor Standards Act. The court, liberally construing the act, also held that the question of commerce and coverage must be determined by practical considerations, not technical conceptions; and that the test is whether the work is directly and vitally related to the functioning of an instrumentality or facility of interstate

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[3] The boundaries of the district are not co-extensive with the city's. The contract bound the city to furnish water to any resident of the district.

[4] Allstate Construction Co. v. Durkin, 345 U.S. 13; Thomas v. Hempt Bros., 345 U.S. 19; Tobin v. Johnson, 8 Cir., 198 F(2) 130; Emulsified Asphalt Products Co. v. Mitchell, 6 Cir., 222 F(2) 913.

commerce as to be, in practical effect, a part of it rather than isolated, local activity.[5]

It is true that the contract between defendant and the District is one step removed from the reported cases, that is here defendant's contract is with the District which will sell water to the city and the city, in turn, will sell to users engaged in commerce; but the evidence here, especially the contract between the District and the City, I think brings defendant's activities within the test set
83 out in Vollmer, supra. It clearly shows that the new dam was the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply; that the city owns a Water Permit (No. 933) issued by the State Board of Engineers for 500,000 acre feet from the Nueces River for domestic, municipal, manufacturing, etc., purposes, and that the full benefit of such permit could not be realized by the present impounding facilities; that the parties have agreed that the city shall thereafter operate and maintain the dam and impounding facilities, and that an ad interim supplementary water supply agreement is to be superseded by the new agreement. I think, therefore, that defendant's construction activities for the district, while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished by technical conceptions, it is at once an improvement, a rebuilding and a new construction. Therefore its work is so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity.

84 Defendant objects to the issuance of a preliminary injunction on the ground that necessity therefor has not been shown, at least until the case is tried upon its merits. I do not see what additional evidence can be

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[5] See also Tobin v. Ramey, 5 Cir., 205 F(2) 606; Mitchell v. Chambers Const. Co., 10 Cir., 214 F(2) 515; Durkin v. J. B. McCray Co., 5 Cir., 206 F(a) 277; Archer v. Brown & Root, Inc., 5 Cir., 241 F(2) 663.

brought forward upon the merits but defendant is fully able to respond to any judgment and there is no pressing need for a preliminary injunction. I would prefer that the case be fully developed. I shall, therefore, treat the foregoing as declaratory, and will set the case for trial upon the merits at Corpus Christi, January 17th, at which additional evdience may be taken if necessary.

The clerk will notify counsel.

(s) JAMES V. ALLRED,
Judge

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85 IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Proceedings

Appearances:

COUNSEL FOR PLAINTIFF:

Mr. Harry Campbell, Jr., Assistant Regional Attorney, Office of the Solicitor, U. S. Department of Labor, Room 218, 1114 Commerce St., Dallas 2, Texas.

COUNSEL FOR DEFENDANT:

Messrs. Johnson, Hite & Callender, 1109 Transit Tower, San Antonio, Texas, by Mr. Sidney D. Callender and Chester H. Johnson.

Messrs. Fischer, Wood, Burney & Nesbitt, 1903 Driscoll Bldg., Corpus Christi, Texas, by Mr. Allen Wood.

Mr. Dean Moorehead, Box 858, Brown Bldg., Austin, Texas.

BE IT REMEMBERED, that upon the trial of the above styled cause, begun on the 21st day of February, A. D. 1958, before His Honor, James V. Allred, Judge of said Court, the following proceedings were had:

86 **Colloquy Between Court and Counsel**

The Court: All right, be seated. Now gentlemen, heretofore I have had a hearing on the petition for preliminary injunction, and heard evidence in October of last year,

filing a memorandum, in which I held that, in my opinion, on the evidence before me, the defendant was in violation of the Fair Labor Standards Act; and in which I stated I didn't see what additional evidence could be brought forward upon the merits, but I would prefer that the matter be fully developed, and would treat the memorandum I entered at that time as declaratory, and set the case for trial upon its merits here at Corpus Christi. I am wondering if it is going to be necessary to hear all this evidence all over again.

Mr. Campbell: No, sir, the parties have agreed, Your Honor, that the record of the proceeding in October may be considered at this time, and I have very little additional evidence, primarily addressed to the Court's discretion.

The Court: Does the defendant have any further evidence to offer?

87 Mr. Wood: We suggest that we just let that constitute the record on the merits, without the introduction of additional evidence, but as Mr. Campbell has said, they want to introduce some additional evidence. In that event, we will need to introduce some additional evidence, but as to just how much it will be depends upon what the plaintiff introduces.

The Court: I wish we could just try it on the record that has been made. I don't see what else could be offered. I have another matter that went over from yesterday afternoon, and I told the parties to be back here at 10:00 o'clock this morning, so I can hear evidence for 30 minutes, I guess.

Mr. Campbell: I think I can complete it in that time.

The Court: The trouble is, you open something up, and it is always just one or two questions, Judge, just going to ask one or two questions, and usually it is two hours or half a day.

Mr. Moorehead: We have made the flat offer, which has been outstanding for several weeks, just to in-

88 troduce the record that was made back in October and rest on that, and if it is opened up by the Government in the way that we anticipate they will do, I think the better part of the day will be required.

The Court: What do you want to offer evidence on, Counsel?

Mr. Campbell: At this time, I will want to offer the interrogatories, served on the defendant in October, and the answers. I will want to offer a transcript of a proceeding in the District Court of New Mexico against the same defendant.

The Court: The transcript of the whole proceedings, or—

Mr. Campbell: A transcript of the complaint, answer and certain interrogatories. It is all certified. I would also want to call Mr. Cavazos for a very brief examination.

The Court: Well, I will hear you for 30 minutes, then I am going to recess this thing over until I get through with the other case.

Offers in Evidence and Objections Thereto

Mr. Campbell: The plaintiff, at this time, Your Honor, will offer the interrogatories and the answers and
89 the transcript.

Mr. Wood: Your Honor, we object, of course, to the admission of this testimony for the purpose of proving the truth of the allegations. In other words, here is the complaint, for example, and it wouldn't be admissible for the purpose of proving the truth of the statements made in the complaint, and we would certainly want it limited to—

The Court: What is it about there? Is that about some lawsuit, you say, in New Mexico?

Mr. Campbell: Yes, sir, that is—

The Court: You mentioned it on the other trial in the summation, as I recall, something about a lawsuit out there, but we didn't have any evidence about it.

Mr. Campbell: No, sir, it is simply the evidence as to the additional dealings between the secretary and the defendant here, which I think is of material importance.

The Court: Well, was it on a similar project?

Mr. Campbell: It was on an airfield. It is not offered as proof that the Mathis Dam project was covered,
90 no, sir. All I am offering at this time is evidence for the proper exercise of this Court's discretion

as to wether a permanent injunction should issue, and the form of that injunction, which I think is all material. The dealings between the defendant and the Department over the years, that is all covered by the interrogatories, his past dealings.

The Court: All right, I will hear it, I guess. I don't like to try another lawsuit.

Mr. Campbell: I don't think that is it. This is merely to show there has been previous litigation between the Department and the defendant.

Mr. Wood: Now, Your Honor, we also object to the affidavits attached to the complaint if they are offered for the purpose of proving the proof of the matters asserted. They would be hearsay.

The Court: They will certainly not be admitted for that purpose.

Mr. Wood: Also the interrogatories and the answers to them, which, as I understand the rule, are for the
91 purpose of that case only. We would make the same objection as to them. Now we think, then, the offer should be limited solely to the proposition of showing what occurred, what the pleadings were and what the proceedings were. Now, Your Honor, not only that, but with reference to these interrogatories and the questions, we make the further objection that the pleadings in this case do not support the offer, and there is no pleading to justify it. What I am referring to there, Your Honor, is paragraph five in the complaint in this case, in which the pleading is that the defendant has violated, and is violating, the Fair Labor Standards Act by failing to comply with it on the Mathis Dam project. There is no pleading at all that he had ever violated the act at any time prior to that, and this is what that apparently seeks to prove. So he hasn't pleaded any prior violations, and we object to it, because there is no pleading to support proof of this sort of thing. To illustrate that, Your Honor, in this petition that he now offers, to show how it differs from the petition before us in this Court paragraph
92 five says—this is the case in New Mexico—"Defendant repeatedly has violated, and is violating, the provisions of Section 715-A of the act, by employing many

of its employees in Interstate Commerce, within the meaning of the act as aforesaid, for a work week longer than 40 hours since February of 1941." He pleaded over there, in other words, prior violations. There are no pleadings whatever in this case of prior violations, and nothing to lead us to suspect that we would be called upon to meet evidence of this character.

The Court: When was the judgment rendered in this case in New Mexico?

Mr. Johnson: January 14, 1955.

The Court: Well, that is pretty remote, and I can see, certainly in a lay mind, and to some extent a legal mind, considerable difference in the activities complained of in connection with construction of an air field and the construction of this dam up here, certainly more room for argument about it.

Mr. Campbell: As I say, Your Honor, this is offered merely as proof that there has been previous litiga-
93 tion, part of the overall history of the dealings between the Department and the defendant.

The Court: There is no claim that he ever violated a New Mexico injunction, is there?

Mr. Campbell: No, sir, the New Mexico injunction was limited to the one project.

Mr. Wood: Your Honor, may I make one further objection, and that is this, that the judgment, the certified copy of the judgment, finds that he was in good faith, the defendant was in good faith in his operations of the job involved there in New Mexico. It does enjoin him from violating the act with reference to that one job; it does not enjoin him, by a general blanket injunction, from ever violating the act at any time in the future. And we take the further objection that those prior contentions and proceedings back in 1941 to the date of this judgment were either litigated by the Government in that case, or could have been under their pleadings, and a final judgment was rendered, refusing to grant the Government a blanket injunction as
94 prayed for, and therefore, these former relationships and contentions and activities were settled adversely to the Government with that decree, which has certainly an implied finding that whatever they were, they

weren't sufficient to justify the granting of a blanket injunction by the Court, and all that past history, whatever it may have been, is res judicata. Now it's true that we don't have a plea here, but if the Court admits it, why, then we would like to file a trial amendment setting up that plea.

The Court: Well, I think your objection and my observation goes more to the weight to be accorded this than it does to the admissibility of it. I will admit it in evidence, and I may strike it out later on, not attach a great deal of importance to it. I don't know.

(Whereupon Government's Exhibit No. 1 was marked for identification.)

Mr. Wood: Note our exception.

The Court: All right.

95 Mr. Campbell: May I call Mr. Cavazos now?

The Court: All right.

Amado Cavazos.

having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Campbell:

Q. State your name and address, please, sir. A. Adamo Cavazos, 302 Windale, San Antonio, Texas.

Q. You are an officer of the H. B. Zachry Company, are you not? A. Yes, sir.

Q. And how long have you been an officer of that company? A. Since some time in 1936.

Q. Are you familiar with the project at Mathis, on the Mathis Dam? A. Yes, sir.

Q. When was that job completed, if it has been completed? A. Well, it is substantially completed, it is ninety nine point something completed. We consider it

96 practically—the original contract practically finished.

Q. Do you have men still working on that project? A. Yes, sir, there are a few men.

Q. Are they compensated for their weekly overtime at this time? A. On the basis as called for in the contract.

Q. They are still not paying them overtime, except under the contract? A. That's right.

Q. So that you are still not paying them overtime on Saturday? A. You mean as such, if they work on Saturday?

Q. Where it is in excess of 40 hours. A. No, sir, not necessarily.

Q. It is not necessary? A. I say, "They are not necessarily being paid if they work in excess of 40, if they had worked the first part of the week more than eight hours every day, it would be in excess of 40.

The Court: In other words, they haven't changed the system since I had the preliminary hearing here?

A. No, sir.

The Court: Same system?

97 A. Yes, sir.

The Court: How many employees do you have left now?

A. I imagine about 40 or 50. There was a small change-over, and we are doing some additional work.

The Court: What type of employees, and what kind of work are they doing?

A. Well, cleaning up, and I believe there is still some sodding and drilling.

Q. Have you had any supplemental contracts on that project? A. It is called a change order.

Q. Have you had any since October? A. Yes, sir.

Q. What were they? A. This change order that calls for some drilling work, I believe it was issued in January of 1931.

Q. What kind of drilling, Mr. Cavazos? A. I am not an engineer, but I understand it is drilling though the concrete for the purpose of obtaining certain type of drainage.

The Court: I saw something in the paper about the drilling, some wells below the dam.

A. I don't know whether you call it wells, but it is

98 some kind of drainage holes to keep the pressure off, or something.

The Court: Yes, I read something about it in the paper.

Q. Are you doing any land clearing in the basin for the dam? A. I don't believe so. I am not that intimately acquainted with the details of the work.

Mr. Campbell: You may cross examine.

Mr. Wood: We have no questions, Your Honor, at this time.

Mr. Campbell: The plaintiff rests, Your Honor.

Mr. Wood: Your Honor, we want to make a motion at this time.

The Court: All right.

Mr. Wood: And I will just dictate it, if I may, to the Reporter.

The Court: All right.

Defendant's Motion to Dismiss

Mr. Wood: This motion to dismiss this action is grounded on the premise that all of the construction workers of the defendant on the Wesley Seale Dam are performing activities closely related, or directed to the production of
99 goods for commerce, thus covered by the provisions of the Fair Labor Standards Act. The record before the Court will not sustain the proposition. While we do not plead such to be the case, it is possible that such records would have sustained the proposition prior to the amendment of Section 203-J in 1949. By this amendment, it is made clear that Congress did not intend to cover employees by the act whose activities are so remote from Interstate activities as those on Mathis Dam. This is evidenced by the House conferee report, 81st Congress, First Section, 1949. As is shown by six or seven examples given in this report, the activity of the employees involved here are at most remotely related, or indirectly essential to the production of goods for commerce, and are therefore not covered by the act. In support of this motion, see Mitchell versus Jaffie, 156 Federal Supplement, Mitchell versus Lublin, 250 Federal Second, 253, Mitchell versus Moore, 241 Federal Second, 249. Wherefore, the defendant prays that the action be dismissed. Your Honor, we won't argue that particularly, unless you would
100 like to have us argue it.

Colloquy Between Court and Counsel

The Court: Well, I am not familiar with those cases.

Mr. Wood: What we had in mind was, we have got some additional authorities since we briefed this before, and

we wanted to have the opportunity to submit you an additional brief on the matter.

The Court: All right, I would be very happy to—

Mr. Wood: Now, Your Honor, we have two witnesses that we had in mind using. In view of the turn things have taken, why,—the Government has rested at this point. I don't know whether we want to go forward any further or not. We would like to have a chance to confer about it.

The Court: Well, we will take a recess and you can confer. Suppose we recess until, say, five minutes of 10:00, and come back at that time, and if you want to present evidence, I will have to set it over until this afternoon, anyway.

Mr. Wood: It is understood, of course, that this
101 former transcript is a part of the record?

The Court: Yes, sir. We will recess until five minutes of 10:00. That clock, I believe, is slow. What do you have?

Mr. Campbell: It is about five minutes slow, Your Honor.

The Court: We will recess ten minutes. That ought to give you time to confer, gentlemen.

(Whereupon a short recess was taken, after which the following proceedings were had.)

The Court: All right, gentlemen, be seated.

Mr. Wood: Your Honor, we wish to put on two witnesses, and we believe they can be put on and finished with in about 30 minutes.

The Court: Well, I know how that goes. You are thinking about from your standpoint, but on cross examination,—

Mr. Wood: That might be something else.

The Court: Well, I tell you what I will do, I will recess this particular hearing over until 2:00 o'clock, and
102 you gentlemen can pass in a list of those authorities. If you have a brief on that question I raised a while ago, I would like to read those cases before I finally dispose of this case. I did have this case set here this morning, but I also had the one yesterday, and the weather prevented me from getting back from Laredo night before last; so I didn't start on that matter until 2:00 o'clock

yesterday afternoon. There is quite an assemblage of folks here in that case, so I will just have to put this over until 2:00 o'clock, if there is any further evidence.

Mr. Wood: Thank you, Your Honor.

The Court: All right.

(Whereupon Court recessed until 2:00 p.m., February 21, 1958, after which the following proceedings were had.)

The Court: All right, Mitchell versus Zachry, we will go forward, Gentlemen. I hope your estimate of thirty minutes is good. I have given you just a little more time than that, not much.

Mr. Wood: Thank you, Judge. We want to offer
103 a trial amendment in connection with the res judicata plea we mentioned to you this morning, and Mr. Campbell has a copy of it.

The Court: All right.

Mr. Wood: Now then, Your Honor, for the limited purpose, and I want to say that we don't waive our objections to the admissibility of the evidence in the New Mexico proceedings that we heretofore made, and subject to those objections, and for the limited purpose of showing what was before the Court in that action, why, we ourselves offer the proceedings, the certified copy that the plaintiff offered that are already in evidence; and we also wish to offer, for the same limited purpose, a certified copy of some stipulations that we made in that case.

(Whereupon Defendant's Exhibit No. 1 was marked for identification.)

Mr. Wood: We offer this in evidence, Defendant's Exhibit 1.

Mr. Campbell: I have no objection, Your Honor.

The Court: What is that? Anybody offered that
104 big thing there?

Mr. Campbell: No, sir, I think that is in the reorganization proceeding.

The Court: All right, I was going to say that I don't believe I'm going to open up anything like that.

Mr. Wood: Now, Your Honor, there are on file here, and they haven't been offered in evidence, but they are

on file in the proceeding a request for admissions, filed by the plaintiff.

The Court: In this instant case?

Mr. Wood: In the instant case, and those requests for admissions have been answered by the defendant. In connection with our objection to the evidence concerning prior alleged, or claimed violations, and our objection as to those proceedings over in New Mexico, and all that, we wish to move to strike those requests for admissions and the answers to those requests for admissions, with the exception of two alleged, or claimed violations that are listed in the requests and in the answers that occurred after the New Mexico suit. I haven't got before me just

105 exactly which two those are, but I believe I can—

these really are written interrogatories, Your Honor, instead of requests for admissions, and the ones that relate to date after the New Mexico proceedings are numbers VI and V, V and VI; and in view of the fact that these interrogatories and the answers have not actually been offered in evidence, I would like to ask Mr. Campbell, if I may, if he regarded them as before the Court.

Mr. Campbell: I offered those in evidence this morning, Your Honor, the interrogatories and the answers.

The Court: In the instant case?

Mr. Campbell: Yes, sir.

Motion to Strike and Ruling Thereon

Mr. Wood: Well, I didn't catch that, so we move to strike those on the grounds we have heretofore objected to the New Mexico proceeding, and all prior alleged violations.

The Court: Well, now, Counsel, Mr. Campbell, you say that you are offering this New Mexico record for the purpose of assisting me in the exercise of my discretion. How will it help me here in this case? That is

106 an entirely different state of facts, entirely different kind of an undertaking, and three years old. How will it help me to exercise my discretion in this case?

Mr. Campbell: On the grounds, Your Honor, that that is not either a first investigation of this defendant by the Department, nor the first litigation that has been had

between this defendant and the Department. In other words, what I am offering the interrogatories and the New Mexico proceedings for is simply to show the Court that this is not a new matter, but a long, continuing controversy, in effect. Now, of course, so far as this matter is concerned, this instant case, it has to be decided basically on the facts applicable to it. That is not offered for any purpose to show that this Mathis project is a covered project, or that the compensation practices were in violation, but merely to show the fact that the defendant has repeatedly been investigated and advised with reference to the Fair Labor Standards Act.

The Court: Repeatedly? There is one lawsuit.
107 Is the record in there that he has been repeatedly investigated?

Mr. Campbell: There is one lawsuit. There have been some six investigations, other than the one upon which that lawsuit was based, and the one upon which this lawsuit was based. There has been a total of eight investigations.

The Court: And two lawsuits since 1941?

Mr. Campbell: Yes, sir.

The Court: This one and the other one?

Mr. Campbell: Yes, sir.

The Court: It may mean a lot to somebody else, but it doesn't mean anything to me. I am going to strike it, and you may have your exception.

Mr. Wood: Your Honor, in view of the ruling of the Court on that,—

The Court: You withdraw your offer of—

Mr. Wood: We had in mind putting on two witnesses to go into those facts that were raised, and some testimony on that, and in view of the Court's ruling, as I understand it now, he strikes the New Mexico proceedings.

The Court: Yes, sir, it doesn't mean anything to me. He has it in the record. If it means something
108 to the Appellate Court, why, all right. It is not going to help me any, and doesn't mean anything to me.

Mr. Wood: Will you let us confer just a moment here at the table, Your Honor?

The Court: Yes, sir. I will use long distance, anyway, here a minute while you are conferring.

Mr. Wood: Your Honor, we are going to put the two witnesses on, but they will be brief.

The Court: All right, I will talk on this long distance call, and be right back.

(Whereupon a short recess was taken, after which the following proceedings were had.)

The Court: All right, proceed, gentlemen.

109 **Amado Cavazos.**

having been previously sworn on oath, testified further as follows:

Direct Examination

By Mr. Callender:

Q. You were sworn this morning, weren't you? A. Yes, sir.

Q. For whom do you work? A. H. B. Zachry Company.

Q. How long have you worked for H. B. Zachry Company? A. Since November 15, 1928.

Q. What are your present duties? A. The title is treasurer, the duties are supervision of financial and accounting matters for H. B. Zachry Company.

Q. Are the payroll records for all of the construction jobs in your office under your supervision and control? A. Yes, sir.

Q. Now in connection with those completed jobs and the payroll records in reference thereto, have you prepared, at our request, some data concerning those jobs?

110 A. Yes, sir.

Q. Do you have that before you? A. Yes, sir.

Q. All right. Now directing your attention to projects completed in 1956, do you have a total number that were completed in 1956? A. Yes, sir, 78.

Q. All right. What was the total volume of those 78 contracts? A. Thirty four million three hundred and fifty two thousand two hundred dollars.

Q. Do you have a record before you of the number of jobs out of that 78 in which you paid, or which the

defendant paid time and a half for all hours over eight and over 40? A. Yes, sir.

Q. How many are those? A. Nine projects.

Q. Nine projects? A. Yes, sir.

Q. For how much? A. Fifteen million four hundred forty three thousand nine hundred.

Q. Now on those nine jobs, you paid time and a
111 half over eight and over 40? A. Yes, sir.

Q. Do you have a number in which you paid time and a half only for eight hours work? A. Yes, sir.

Q. How many? A. Four projects.

Q. What was the total volume of those? A. Four million ninety four thousand eight hundred.

Q. All right. Now do you have broken down the number of jobs in which you paid overtime for all hours after 40, in compliance with the Fair Labor Standards Act? A. Yes, sir.

Q. What number are those? A. 65 projects.

Q. 65 projects.

The Court: Repeat that, 65 projects in which you did what?

A. In which time and a half was paid for all hours after 40, as required by the Fair Labor Standards Act.

Q. What was the total amount of those 65? A. You men contracts?

Q. Yes. A. Fourteen million nine hundred thirteen
112 thousand five hundred.

Q. Now out of 78 jobs that you completed in 1956, you complied with the requirements of the Fair Labor Standards Act in all of those but four, is that right? A. Yes, sir.

Q. What percentage does that bear? Do you have a percentage? A. Five and one tenths percent of 78.

Q. Would that be 94.9 percent compliance in all jobs completed in 1956? A. Yes, sir.

Q. Now, 1957, what was the total?

The Court: What percentage was that?

Mr. Callender: 94.8, I believe, Judge.

A. 94.9.

Q. Now in 1957 how many jobs did you complete? A. 74.

Q. What was the amount of those 74 jobs? A. Twenty million, if I may leave off the hundreds.

Q. All right. Now how many jobs of those 74 did you pay only for time and a half after eight? A. Only one.

Q. Only one. All right, how many of those jobs did you pay time and a half for all hours worked over 40? A. 61.

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Q. What is the total volume of that? A. Eleven million four hundred sixty five thousand.

Q. Now how many of those jobs did you pay time and a half over eight and also over 40? A. Twelve projects.

Q. All right, how much is that? A. Two million six hundred and sixty nine thousand.

Q. All right. Now these 74—

The Court: How much was that last? A. Two million six hundred and sixty nine thousand dollars.

Q. Of those 74 jobs, how many of those jobs were under the Fair Labor Standards Act in which you paid time and a half over 40 total? A. 73.

Q. And how many were not? A. One.

Q. One. What percentage does that bear to the whole? A. One and four tenths per cent, approximately.

Q. All right. Now do you have the number of jobs in process for 1958? A. Yes, sir.

Q. How many jobs were in progress at the be-

114 ginning of 1958? A. We had 33 projects going.

Q. What was the total amount of those contracts? A. Twenty three million ninety seven thousand.

Q. Of that number, how many were under the act? A. 31.

Q. Can you give us a total of those 31 jobs? A. Let me add up two figures. Twenty two million sixty one thousand.

Q. All right. Now of that number, how many were contracted not under the act? A. Only two.

Q. And how much is that contract for? A. One million thirty six thousand.

Q. Now of those jobs that were contracted under the provisions of the Fair Labor Standards Act, what is the percentage that bears to the total number of jobs in which you have paid according to the act? A. Six and one tenth percent. You say not covered?

Q. No, that were covered. A. I am sorry. Ninety three and nine tenths percent.

Q. In other words, in 93.9 percent of the cases, you pay according to the Fair Labor Standards Act, is that
115 right? A. Yes, sir.

Q. Now have you made a recapitulation of those years, 1956, '57 and the 1st of January of 1958? A. Yes, sir.

Q. All right, what were the total number of jobs, either completed during 1956 and '57, and/or in progress at the beginning of 1958? A. 185 jobs.

Q. What was the total volume of those contracts? A. Seventy eight million three hundred eighty three thousand.

Q. Now of that total of one hundred eighty five, what was the total number of those that you paid according to the provisions of the Fair Labor Standards Act? A. 178.

Q. 178 out of the total of 185. There were seven, I take it, that were not contracted to be under the act? A. Yes, sir.

Q. Is that right? A. Correct.

Q. Now percentage wise, what percent does the total number of jobs that you have complied with the act bear to the total number of jobs that you had? A. 96.2
116 percent were considered covered by the act.

Q. All right. What percent was considered not covered? A. 3.8, three and eight tenths percent.

Mr. Callender: Pass the witness.

Cross Examination

By Mr. Campbell:

Q. Mr. Cavazos, those jobs you listed here, does that include this Mathis project? A. Yes, sir.

Q. Did you know when this Court ruled that that project was subject to the Fair Labor Standards Act in December? A. I didn't understand it was a ruling to that effect, I understood it was a tentative opinion. I wasn't given the information that way, no, sir.

Mr. Wood: Your Honor, that ruling was not the nature of a final judgment or anything.

The Court: That's right.

Mr. Wood: So we object to the question.

The Court: Let him cross examine. It is all
117 right.

Mr. Wood: Yes, sir.

Mr. Campbell: He said he didn't understand it that way, Your Honor, so I think that answers the question. That's all.

Mr. Callender: Step down, Mr. Cavazos. Mr. Zachry.

H. B. Zachry.

having been first duly sworn on oath, testified as follows:

Direct Examination

By Mr. Callender:

Q. Will you please state your name. A. H. B. Zachry.

Q. And where do you live, Mr. Zachry? A. In San Antonio, Texas.

Q. And how old are you? A. 56.

Q. Have you lived in Texas all of your life? A. Yes, sir.

118 Q. Do you have a family? A. I do.

Q. What does that consist of? A. I have a wife, five children and one grandchild.

Q. I see. What is your business or occupation? A. General contractor.

Q. How long have you been engaged in that business? A. Under my own name, since 1924, which would be 34 years.

Q. 34 years. Mr. Zachry, can you give us an approximation as to the total number of jobs you have completed since you have been in the business? A. Yes, sir, it would be approximately 1200.

Q. 1200. Now can you give us, in volume, dollarwise in volume, approximately how much all of those contracts have amounted to? A. It would be in excess of three hundred million.

Q. In excess of three hundred million. Is it true that you have never been in Court with the Department of Labor on a Fair Labor Standards suit, with the exception of today, and the suit in New Mexico? A. That's correct.

Q. Those are the only two times that you have ever been in Court over a Fair Labor Standards Act case? A. Yes, sir.

119 Q. Have you ever been sued by an employee for overtime wages? A. No, sir.

Q. Never since you have been in business, is that right? A. That's correct.

Q. Did you attend college? A. I did.

Q. Where? A. Texas A & M.

Q. Do you have any affiliation with that college now? A. I am on the Board of Directors.

Q. On the Board of Directors. At the present time, can you give us approximately the number of jobs you have going when it is not raining? A. If I remember correctly, Mr. Cavazos stated that it was 33. It is somewhere in that neighborhood.

Q. Can you tell us in what states these jobs are being operated? A. Well, I have not refreshed my memory on that, but offhand, I know we are working in Texas, in Louisiana, in Missouri, in New Mexico, those are the only ones I am certain of.

Q. Can you tell us approximately how many employees you have presently on your payroll, an approxima-
120 tion? A. Somewhere around 1500.

Q. Now do you belong to the AGC? A. Yes, sir.

Q. What is that? A. It is the Associated General Contractor or trade association.

Q. Does it consist of contractors? A. Right.

Q. In your present work, can you tell us briefly what that consists of? A. Well, the members of that association do approximately 90 percent of the construction work that is done in the United States.

Q. Now does your company, Mr. Zachry, have a policy, a company policy with regards to compliance with the Fair Labor Standards Act? A. We do.

Q. Just tell the Court briefly what you do in regard to the wage and hour division of the Fair Labor Standards Act. A. We necessarily bid on a great number of jobs, many more than we are awarded the contract for. Unless the type of job that is being bid on runs in a standard form, or is considered originally as being under the
121 wage and hour law, we ask our legal department for a preliminary opinion as to whether that job is or is not under that act.

Q. Do they give that to you? A. They do.

Q. All right, sir. Then what occurs? A. Then we figure the job accordingly. Q. All right, sir. Now who is in your legal department besides myself? A. Mr. Chester Johnson is head of it. You and Mr. O. D. Height and Mr. Gregory.

Q. All right. Do you rely upon that opinion in making your bids as to whether or not the individual job is covered by the act? A. We very definitely do. These jobs are highly competitive, and it is necessary for us to know so that we can take advantage of whatever rate is to be paid in figuring the costs to go into that bid.

Q. All right. Do you have a man working for you named Mr. E. M. Hammon? A. I do.

Q. What is his duty with your company? A. He is principally responsible as to police our jobs, check with the field office and see about our compliance with our
122 labor requirements. His second job is to check on our safety procedures and hold, or direct the holding of safety meetings.

Q. Do you know of your own knowledge whether or not Mr. Hammon has met with Mr. Earl Street, the regional attorney for the Department of Labor in Dallas, to confer about particular jobs being covered or not covered? A. Yes, sir, he meets with him. He is a member of your State Board, and also on the AGC committee. He is to confer with them and accept and carry out certain rulings that have been had and then passed upon as being the correct ones to use.

Q. Do you know of your own knowledge whether or not Mr. Hammon also meets with the attorneys for the Labor Department in Washington regarding coming under the wage and hour law? A. He has on several occasions at our request.

Q. Now Mr. Zachry, has it been your experience in the past, and is it your intention now, as well as in the future, to comply with the provisions of the Fair Labor Standards Act, when it is applicable to a job? A. It always has been, it is now and will be.

Mr. Callender: Pass the witness.

123 Cross Examination

By Mr. Campbell:

Q. Mr. Zachry, have you any idea what amount of overtime is due the employees on the Mathis job? A. No, sir, I don't think there is any that is due them.

The Court: He is asking, Mr. Zachry, if it is covered by the act, if I am right on this preliminary opinion that I gave. That is the premises of your question?

Mr. Campbell: Yes, Your Honor.

The Court: Which, of course, if I hold that, ultimately you will probably want to test it out, but he is asking you if you are under the act, do you have any idea how much overtime would be due to your employees? A. Something in the neighborhood of $50,000.00.

Q. Were you advised of the decision of this Court in this matter that was handed down in December? A. It was my understanding that there was no firm decision.

Q. I asked you, were you advised of what the decision was? A. No, sir, I say it was my understanding
124 there was no decision handed down from the Court.

Q. You made no change in your compensation practice at that time? A. We have not.

Mr. Campbell: I believe that's all.

Redirect Examination

By Mr. Wood:

Q. About this job, the Mathis Dam job, Mr. Zachry, when you bid on that, did you have an opinion from your attorney as to whether or not the job was covered by the Labor Relations Act? A. Yes, sir.

Q. What was it? I mean the Fair Labor Standards Act, excuse me. What did your attorneys advise you about that? A. They told us, in their opinion, it was not. After we had started work on the job, we asked them to again review it and to give us a written opinion as to whether there was any change in their previous oral opinion or not.

Q. Did they later give you a written opinion? A.
125 They did.

Q. And that written opinion was to the effect that the job was not covered? A. That's right.

Mr. Wood: That's all.

Mr. Callender: Your Honor, the defendant at this time rests and closes.

Mr. Campbell: The plaintiff has nothing more.

The Court: Maybe Mr. Zachry can answer this question that occurs to me. Mr. Cavazos testified there are 40 or 50 still employed up there, Mr. Zachry, I believe that is what he said, in connection with some of these wells. How much longer do you anticipate this Mathis Dam project is going to continue, and you will have employees up there? A. Well, barring continued rainy weather, we would be through within 30 days.

The Court: If you get 30 days of good weather, you will be through? A. Yes, sir.

Mr. Callender: In view of the Court's question, may I ask one question?

The Court: Yes, sir.

126 Mr. Callender: In the drilling of these wells, which the Judge asked you about, is that under subcontract to another concern? A. Yes, sir, we have subcontracted that to Lane-Texas Company.

The Court: Maybe I had that confused.

Then what are these employees doing up there? A. Part of them are working for Lane-Tex.

The Court: Subcontract? A. Yes, sir.

The Court: And the others, what are they doing? A. Well, there is a certain part of that work, like when we finish drilling those wells, we have to case them in concrete, and those items are being done by our own forces. It is a small amount of work.

The Court: All right.

Mr. Campbell: May I go into that very briefly?

The Court: Yes, sir.

Recross Examination

By Mr. Campbell:

Q. Mr. Zachry, are you doing any clean-up work? A. No, sir.

Q. Not removing any trees or shrubbery? A. No, sir.

Mr. Campbell: That's all.

Mr. Callender: We have no further questions. Step down, Mr. Zachry.

Renewal of Motion to Dismiss

Mr. Wood: Your Honor, we renew our motion we made this morning, and we just very hastily compiled a memorandum to present to you on it, and don't expect you to read it right now, of course. We simply tore out a couple of decisions and attached a copy of the committee report that we referred to.

The Court: All right, I would like to review this a little further before I pass finally on it.

Mr. Wood: We would like to have an opportunity, if we could, Your Honor, to file an additional brief on some
128 more authorities we have. That, of course, was very hastily prepared.

The Court: Have you furnished Counsel with a copy of your brief?

Mr. Wood: Yes.

The Court: Well, gentlemen, this case will be submitted Monday week. Get your briefs in by that time. All right.

Mr. Campbell: In other words, you want the briefs submitted simultaneously, Your Honor?

The Court: That will be all right. You have most of theirs, anyway. I suppose they have furnished you with a copy of this?

Mr. Campbell: Yes, sir.

The Court: All right, I will regard it submitted Monday week, March 3rd. All right.

129 (Reporter's Certificate to foregoing transcript omitted in printing.)

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130 IN UNITED STATES DISTRICT COURT

Docket Entry—Dated February 21, 1958

Trial on merits—Evidence heard—Briefs to be filed on or before 3/3/58, at which time matter will be regarded as submitted. J.V.A.

131 IN UNITED STATES DISTRICT COURT

Trial Amendment—Filed February 21, 1958

Now comes Defendant, H. B. Zachry Company, and leave of Court having been first obtained, files this Trial Amendment, and would respectfully show:

I.

In the case styled JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF, VS. H. B. ZACHRY COMPANY, a corporation, DEFENDANT, CIVIL ACTION FILE NO. 2704, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, filed October 28, 1954, Plaintiff alleged:

"V.

"Defendant repeatedly has violated and is violating the provisions of Section 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce, within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours since February, 1941, without compensating these employees for their employment in excess of 40 hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

132 "VI.

"Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act."

II.

The judgment in the above cause filed January 13, 1955, and the order amending such judgment filed January 14, 1955, show that while the Court held that the Holloman Air Force Base at Alamagordo, New Mexico, was covered by the provisions of the Fair Labor Standards Act and restrained Defendant from violating the provisions of the

Act while engaged in such construction, the Court did not grant the blanket injunction prayed for in the complaint that it permanently enjoin Defendant from violating the provisions of Section 15(a)(2) of the Act, and the judgment expressly found that the Defendant, H. B. Zachry Company, at all times material hereto, in its actions in contending that the Fair Labor Standards Act of 1939, same being Title 29, U. S. Code 201 et seq., did not apply to the contract in this cause, so acted in good faith and pursuant to legal opinions furnished to its officers by its attorneys.

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III.

Accordingly, in the above cause, Plaintiff actually did, or at least could have, put in issue every claimed violation of the Act by Defendant that had occurred prior to such suit, and such being the case, the judgment rendered fixes and establishes the rights of the parties as of the date of such judgment and gave the Plaintiff all the relief to which it was entitled by virtue of the issues raised, and such judgment is res adjudicata and the Plaintiff cannot at this time re-litigate the issues that were and could have been so adjudicated in said cause.

IV.

As is shown above, the case in the United States District Court for the District of New Mexico was one between the same parties who are in this cause, said judgment referred to is a final judgment and no appeal was prosecuted therefrom.

WHEREFORE, Defendant prays as in its Original Answer.

(s) CHESTER H. JOHNSON

(s) SIDNEY D. CALLENDER

(s) R. DEAN MOORHEAD

(s) ALLEN WOOD

134 IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Memorandum Opinion—March 14, 1958

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For Defendant

March 14, 1958.

Action by the Secretary of Labor to restrain defendant from violating section 15(a)(2) of the Fair Labor Standards Act, 29 U.S.C.A. 201 et seq., by failing to pay time and one-half to its construction employees for all work in excess of 40 hours per week. A hearing was had before the court on October 4, 1957, as to whether a preliminary injunction should issue. At that time the court held
135 that defendant's construction employees, engaged in the construction of the Wesley E. Seale dam on the Nueces river, were within the coverage of the Fair Labor Standards Act; but the court declined to issue the preliminary injunction until the case could be fully and finally

developed on the merits. Trial has now been had and by stipulation all of the evidence taken on the hearing for preliminary injunction has been incorporated as a part of the record here.

The memorandum of this court, dated December 10, 1957, dealing with the hearing on the preliminary injunction is hereby adopted for all purposes and the same findings of fact are now made as supplemented by any statements made herein.

Defendant now points to the fact that the time and one-half provision of the Fair Labor Standards Act applies to employees: (1) engaged in commerce or (2) in the production of goods for commerce; that the first class consists of those engaged in the actual movement of commerce, or in connection with instrumentalities which make possible such movement as persons working on interstate highways, railroad bridges, interstate canals, etc.; and that this court principally relied upon an "in commerce" case, Mitchell v. Vollmer, 349 U.S. 427, 75 S. Ct. 860, which dealt with employees working on an alternate lock
136 and canal forming a part of the Gulf Intercoastal Waterway.[1]

Defendants point out that here Zachry's employees admittedly are not engaged in the actual movement of commerce or in connection with the instrumentalities of such movement; that neither are they engaged in the production of goods for commerce and could not come under the Act except for the provision in subdivision (j) of section 203 of the statute, defining "produced" as meaning an employee engaged "in *any closely related process* or occupation *directly essential* to the production" of goods for commerce.[2] Pointing to the fact that the statute formerly read: "in any other manner working on such goods or in any process or occupation *necessary* to the production thereof, in any State" was changed by an amendment in 1949 to the present language, defendant insists that Congress

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[1] The same observation may be made with reference to two other cases cited in this court's original memorandum: (a) Tobin v. Ramey, 5 Cir., 205 F. 2d 606; and (b) Archer v. Brown & Root, Inc., 5 Cir., 241 F. 2d 663.

[2] Emphasis supplied throughout this memorandum unless otherwise indicated.

intended to narrow the scope of coverage;[3] and says that its employees are not engaged in any process or
137 occupation *closely related* or *directly essential* to the production of goods for commerce.

It cannot be disputed that Congress intended to narrow the scope of coverage by the 1949 amendment; and this court perhaps placed too much reliance upon Mitchell v. Vollmer, supra, since that case dealt with employees "engaged in commerce" itself and the test there laid down was, not whether the work is new construction, but whether it is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity. That test is inapplicable where coverage is bottomed, as here, on "production of goods for commerce," in which case the rule that contractors engaged in *original* construction generally are not engaged in commerce does *not* apply to *repair* or *replacement* of existing facilities, Chambers Construction Company v. Mitchell, 8 Cir., 233 F 2d 717. This was recognized by both parties when briefs were filed on the preliminary injunction, defendant contending that the Wesley Seale Dam was *new construction*, plaintiff that it was *repair* and *replacement* of an old facility. This court held that it was an enlargement of the existing facilities, "at once an improvement, a rebuilding and a new construction."

138 This court cited, among other cases, the Chambers case supra in which city water was sold to railroads which used it continuously in interstate commerce and to others who used water incident to the manufacture of products distributed and sold in interstate commerce. It was there held that construction of a new segment of the city's water supply main, crossing a river as a replacement for similar segment, constituted a replacement or repair, not new construction, and, therefore came within the Fair Labor Standards Act.

This court also cited Mitchell v. Chambers const. Co., 10 Cir., 214 F 2d 515, wherein a project to augment a city's

[3] Citing the Labor Department's Administrative Regulations, sections 776.0 to 776.30 of the Code of Federal Regulations, 3 C.C.H. Labor Law Rep., sec. 24,102.17; Mitchell v. Moore, 6 Cir., 241 F. 2d 249; Mitchell v. Jaffe (D.C., Ala.), 156 F. Supp. 596.

water supply was held to be an addition to, or enlargement of an existing water system and covered by the act notwithstanding that it was physically removed from the existing system and not immediately connected to the city's distribution system. Both of the Chambers Construction Company cases were decided after the 1949 amendment and the facts there are similar to those here, the only distinction being that here the District intervened between defendant and the city, one step removed from the two Chambers cases. But, as pointed out in the original memorandum:

"The contracts between defendant and the District on the one hand and the City of Corpus Christi and the
139 District on the other have been introduced in evidence. While defendant is an independent contractor, contracting with the District, a separate and distinct political entity from the city, consideration of both contracts and the complete picture presented by the evidence clearly discloses that the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city.[3]

This court adheres to the previous holding that defendant's construction workers are covered by the Act. Defendant says the Government has not sustained its burden of proving that the activities of its employees rather than the activities of defendant, are closely related, or directly essential, to the production of goods for commerce; but, at the outset of the previous hearing, when defendant requested the names of the affected employees, it was stated that the actual construction workers only were involved. Defendant's counsel expressed satisfaction
140 with this statement. The case has been tried on the theory that those engaged in actual construction work only were involved.

There remains the question of whether a permanent injunction shall issue; and, if so, the scope thereof. Plaintiff insists that the injunction should issue, offering in

[3] Footnote 3 of former memorandum: The boundaries of the District are not co-extensive with the city's. The contract bound the city to furnish water to any resident of the district.

evidence the record of a previous proceeding against defendant in the United States District Court in New Mexico. The court sustained defendant's objections to the introduction of the record in that case. However, on brief, defendant has referred to the New Mexico case as though it was in evidence; therefore, the court changes the previous ruling and admits that record in evidence, although, as stated at the time, it has very little bearing on the issues here.

Whether an injunction shall issue still rests in the sound discretion of the trial court.[4] Pointing to evidence that (1) during the past three years defendant has handled 185 jobs with a value of over seventy-seven million dollars in which the employees had been paid overtime in accordance with the Fair Labor Standards Act formula on 178 jobs, or 96.2% of the total; (2) that it was advised
141 by its legal department that the Wesley Seale Dam job did not come within the Act; (3) the testimony of its president that defendant desired to comply with the Act where it was applicable; and (4) to other factors, defendant insists that the court should not issue an injunction, either as to the present case or generally. Plaintiff, on the other hand, points to: (1) the New Mexico injunction; (2) the decisions in the two Mitchell cases cited above and others which show that defendant's operations on the Seale Dam were clearly covered by the Act; (3) that while defendant may have been in compliance on 96.2% of all *jobs* performed, yet on a dollar value basis it has only been in compliance on 84.7%; and (4) because defendant has not complied with the Act since the holding of this court on December 10, 1957, that it was subject to the Act.

Defendant's activities had been going on for almost two years, and an investigation had been made at least six months before plaintiff's complaint was filed September 12, 1957, at which time a preliminary injunction was sought because the project was almost completed. A hearing was held October 4, 1957. The court's memorandum was filed December 12, 1957, denying the petition for preliminary injunction and setting a hearing upon the merits for

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[4] Mitchell v. Bland, 5 Cir., 241 F. 2d 808; Mitchell v. Hodges Contracting Company, 238 F. 2d 380.

January 17, 1958. On January 4, 1958, the hearing
142 was re-set, by agreement of the parties, for February 21, 1958, at which time it was completed. At that time defendant's president estimated the project would be finished in 30 days.

In the exercise of discretion, the court will order an injunction on the particular project as to the construction employees only. I do not know whether the matter will become moot or not before an appeal can be taken; but, in any event, no great harm will come if the court is in error. The court declines to enjoin defendant generally, finding that defendant has acted in good faith and that there was room for an honest belief by defendant that the project was not covered. The court does not feel that defendant should act at his peril in connection with all projects in the future.

The Clerk will notify counsel to submit an order accordingly.

(s) JAMES V. ALLRED
Judge

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143 IN UNITED STATES DISTRICT COURT

Judgment—April 3, 1958

This cause having come on to be heard and the Plaintiff appearing through his attorneys and the Defendant being present in Court with its attorneys, and the Court having heard the evidence and being duly advised in the premises, finds:

1. That the Court has jurisdiction of the parties and the subject matter.

2. That the Defendant acted in good faith at all times material hereto.

3. That the Defendant should be enjoined from violating the provisions of the Fair Labor Standards Act of 1938, as amended, while engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and Defendant, dated October 21, 1955, and while Defendant is engaged in the

construction of the Wesley E. Seale dam on the Nueces River near Mathis, San Patricio County, Texas, pursuant to the terms of said contract.

Wherefore, it is hereby ORDERED, ADJUDGED AND DECREED THAT Defendant, its officers, agents, servants, employees, and all persons acting, or claiming to act, in its
144 behalf and interest, be and they hereby are restrained and enjoined from violating the provisions of the Fair Labor Standards Act, as amended, 29 U. S. C. A. 201, et seq. (Act of June 25, 1938) hereinafter referred to as the "Act," while engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and Defendant covering the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, dated October 21, 1955, in the following manner:

The Defendant shall not, contrary to Section 7 of the Act, employ any of its non-exempt construction workers on the dam site who are engaged in the production of goods for commerce, as that term is defined by the Act, for workweeks longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one-and one half times the regular rate at which he is employed.

It is further ORDERED, ADJUDGED AND DECREED THAT Plaintiff have and recover his cost.

To all of which the Defendant objects and excepts.

145 DATED AND ENTERED this 3rd day of April, 1958.

(s) JAMES V. ALLRED
United States District Judge

APPROVED AS TO FORM:

.....

.....
Attorneys for Plaintiff

.....

.....
Attorneys for Defendant

146 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed May 22, 1958

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that H. B. Zachry Company, Defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the judgment and order entered in this action restraining and enjoining the Defendant, its officers, agents, servants, employees and all persons acting or claiming to act in its behalf and interest from violating the provisions of the Fair Labor Standards Act as amended, 29 U.S.C.A. 201, et seq., while said Defendant is engaged in the performance of that certain construction contract between the Lower Nueces River Water Supply District and the Defendant covering the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, said judgment having been entered in this action on April 3, 1958.

147 DATED this 21 day of May, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
1109 Transit Tower
San Antonio, Texas

(s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas

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153 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed May 23, 1958

Notice is hereby given that James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff above named, hereby appeals to the Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the third day of April, 1958, in so far as it is, by its terms, limited to the performance of the construction contract between the Lower Nueces River Water Supply District and the defendant, H. B. Zachary Company, a corporation, dated October 21, 1955,

and while the defendant is engaged in the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, under the terms of that contract.

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT
OF LABOR

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154 IN UNITED STATES DISTRICT COURT

Concise Statement of Points on Which Defendant-Appellant Intends to Rely on Appeal—Filed June 6, 1958

Comes Now Defendant -Appellant H. B. Zachry Company and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure files this its Concise Statement of the Points on Which Defendant-Appellant Intends to Rely on Appeal of this cause to the Circuit Court of Appeals, Fifth Circuit, New Orleans, Louisiana:

1. The trial court erred in holding that the activities of Defendant's construction employees were closely related and directly essential to the production of goods for commerce because there was no evidence whatsoever introduced or offered concerning the activities of any single construction employee of Defendant.

2. The trail court erred in holding that Defendant's construction employee, that is, those construction employees engaged in the construction of the Wesley E. Seale Dam on the Nueces River near Mathis, San Patricio County, Texas, were engaged in the production of goods for commerce.

3. The trial court erred in failing to hold that
155 the construction of the Wesley E. Seale Dam was a local project and hence without the provisions of

the Fair Labor Standards Act as amended, 29 USCA 201, et seq.

4. The trial court erred in failing to hold that the activities of the construction employees of the Defendant were too remote from the production of goods for commerce and hence without the provisions of the Fair Labor Standards Act as amended, 29 USCA 201, et seq.

5. The trial court erred in granting an injunction against the Defendant because the Plaintiff failed to prove that the activities of the Defendant's employees were closely related and directly essential to the production of goods for commerce.

6. The trial court erred in denying Defendant's Motion for a more Definite Statement.

7. The trial court erred in overruling Defendant's Motion to Dismiss at the conclusion of Plaintiff's evidence.

DATED June 2, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
501 Transit Tower
San Antonio, Texas

156 (s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas

(s) R. DEAN MOORHEAD
328 Perry Brooks Building
Austin, Texas
Attorneys for Defendant-Appellant

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157 IN UNITED STATES DISTRICT COURT

Motion to Send Original Exhibits—Filed June 6, 1958

Plaintiff-Appellee James P. Mitchell, Secretary of Labor, and Defendant-Appellant H. B. Zachry Company hereby move the Court that the original of the following exhibits used in the trial of the above entitled and numbered cause now on appeal be sent to the United States Court of

Appeals for the Fifth Circuit at New Orleans, Louisiana in lieu of copies thereof for the reason that the exhibits are extremely lengthy and technical encompassing drawings, plats, pictures, plans and specifications and that photostating or other means of copying said exhibits would constitute an insurmountable task:

Plaintiff's Exhibit No.

1. Water Contract
2. Summary Report of Bond Issue
3. Bond Election Order
4. Preliminary Circular
5. Photograph of Wesley Seale Dam
6. Records of Sale of Water for Corpus Christi
158 7. Contract of Water District and H. B. Zachry Company

DATED this 6th day of June, 1958.

(s) CHESTER H. JOHNSON

(s) SIDNEY CALLENDER
501 Transit Tower
San Antonio, Texas

(s) ALLEN WOOD
Driscoll Building
Corpus Christi, Texas
Attorneys for Defendant-Appellant

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT OF LABOR

Attorneys for Plaintiff-Appellee

159 IN UNITED STATES DISTRICT COURT

Order to Transmit Original Exhibits—Entered and Filed June 7, 1958

Came on to be heard the joint motion of Plaintiff-Appellee, James P. Mitchell, Secretary of Labor, and Defendant-Appellant, H. B. Zachry Company, that the originals of the following exhibits used in the trial now on appeal be sent to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana in lieu of copies thereof, and it appearing to this Court that such original exhibits should be inspected by such Appellate Court and also that photostating or other means of copying said exhibits would constitute an insurmountable task;

It is ORDERED that the originals of the following exhibits be sent to the United States Court of Appeals for the Fifth Circuit in lieu of copies thereof:

Plaintiff's Exhibit No.

1. Water Contract
2. Summary Report of Bond Issue
3. Bond Election Order
4. Preliminary Circular
5. Photograph of Wesley Seale Dam

160 6. Records of Sale of Water for Corpus Christi
7. Contract of Water District and H. B. Zachry Company

ENTERED this 7th day of June, 1958.

(s) JAMES V. ALLRED
United States District Judge

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161 IN UNITED STATES DISTRICT COURT

Motion to Transmit Original Papers—Filed May 31, 1958

Comes now plaintiff, James P. Mitchell, Secretary of Labor, United States Department of Labor, appellee and cross-appellant, and respectfully moves the Court to transmit the originals of Government's Exhibit I, offered in evidence at the trial of the above cause on February 21, 1958, and the interrogatories served by plaintiff upon the

defendant and filed in this cause on the 12th day of October, 1957, together with the answers to such interrogatories filed in this cause on October 25, 1957, which were also offered in evidence in this cause. In connection therewith plaintiff respectfully shows that said exhibits are lengthy and that the copying thereof would materially increase the expense of the parties herein.

(s) STUART ROTHMAN
Solicitor

(s) EARL STREET
Regional Attorney

(s) HARRY CAMPBELL, JR.
Assistant Regional Attorney

UNITED STATES DEPARTMENT
OF LABOR

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162 IN UNITED STATES DISTRICT COURT

Order to Transmit Original Papers—June 3 and 4, 1958

Now on this 3rd day of June, 1958, the Court, having considered the motion of the plaintiff herein to transmit to the Court of Appeals Government's Exhibit I, which was duly offered in evidence at the trial of the above styled and numbered cause on February 21, 1958, as well as certain interrogatories and answers thereto similarly offered in evidence at said trial, and being fully advised in the premises, is of the opinion that said motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Government's Exhibit I, offered in evidence at the trial of this cause on February 21, 1958, and the interrogatories filed herein on October 12, 1957, and the answers thereto filed on October 25, 1957, be, and the same are hereby, ordered transmitted to the Court of Appeals for the Fifth Circuit in connection with the foregoing appeal.

(s) JAMES V. ALLRED
United States District Judge

163 Clerk's Certificate to foregoing transcript omitted in printing.

(File endorsement omitted)

164 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION File No. 1645

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Plaintiff*

v.

H. B. ZACHRY COMPANY, a corporation, *Defendant*

Interrogatories—Filed October 12, 1987

Comes now James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following interrogatories on the defendant, H. B. Zachry Company, a corporation, in accordance with Rule 33 of the Federal Rules of Civil Procedure, to be answered under oath within fifteen days of the date of service hereof:

I.

Please state whether, in February 1941, the defendant's operations were investigated, covering the period from on or about June 1, 1940, to December 31, 1940, during which period the defendant was engaged in highway reconstruction, maintenance and repair.

II.

Please state whether, in November 1943, an investigation was made of the operations of said company covering the period from January 1, 1941, to November 7, 1943, during which period defendant was engaged in the construction, maintenance, reconstruction, repair of highways, air fields, etc.

III.

Please state whether, in December 1945, the defendant's operations were investigated, covering the period from

Novmber 7, 1943, to December 31, 1945, during which period defendant was engaged in the construction, reconstruction, maintenance and repair of railroads and highways, and in the operation of a quarry from which gravel was produced to be used in the aforesaid work.

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IV.

Please state whether, in October 1950 and October 1951, the defendant's operations were investigated covering the period from October 22, 1948, to October 18, 1951, during which period the defendant was engaged in reconstruction and extension of power lines.

V.

Please state whether an investigation was made of the operations of the defendant in August 1955 covering the period from February 5, 1955, to August 7, 1955, during which period was engaged in the construction of additional track facilities for the Atcheson, Topeka and Santa Fe Railroad, between Sanger, Texas, and Dallas, Texas.

VI.

Please state whether, in March 1957, the operations of the defendant were investigated covering the period from October 28, 1956, to April 6, 1957, during which period the defendant was engaged in the construction of an extension to the pipeline of the Texas Eastern Transmission Company, the original pipeline of said concern reaching from the State of Texas to the State of New Jersey.

VII.

Please give the name of the official, or officials, of the defendant with whom conferences were held at the conclusion of each of the investigations inquired about in Interrogatories I through VI.

VIII.

Please state whether the representative of the United States Department of Labor advised the defendant, with reference to each of the investigations listed in Interrogatories I through VI, that violations of the overtime provisions of said Act had been found.

IX.

If representatives of the said defendant were so advised, please state the nature of the violations called to their attention.

X.

(a) Please state the categories of work bid on or performed by the defendant, such as highway work, railroad work, power line work, water system work or dam or levy work since 1946.

166 (b) Please state whether defendant intends in the future to continue to bid on and perform in such categories.

STUART RATHMAN
STUART ROTHMAN, *Solicitor*

EARL STREET
EARL STREET, *Regional Attorney*

HARRY CAMPBELL, JR.
HARRY CAMPBELL, JR., *Assistant Regional Attorney*

UNITED STATES DEPARTMENT OF LABOR

Certificate of Service

(Omitted in printing.)

(File endorsement omitted)

169 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION No. 1645

(Title omitted)

Answers to Interrogatories—Filed October 25, 1957

Comes now H. B. ZACHRY COMPANY, Defendant in the above styled action, by and through its duly authorized attorneys, and answers the written Interrogatories propounded to it by Plaintiff on or about October 11, 1957.

I.

Answer to Written Interrogatory No. 1.

In February, 1941, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from June 1, 1940, to December 31, 1940, during which period Defendant performed for the Highway Department of the State of Texas certain highway contruction contracts. After said examination, such representative told A. Cavazos and H. B. Zachry, officers of the defendant corporation, that some of Defendant's employees were covered by the Fair Labor Standards Act and that Defendant was not complying with the Act in that some of said employees were not being paid overtime in accordance with said Act. Defendant did not agree that it was in violation of any of the provisions of the Fair Labor Standards Act, but agreed to and did exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

II.

Answer to Written Interrogatory No. II.

In November, 1943, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from January 1, 1941, to November 7, 1943, during which period De-
170 fendant performed numerous contracts, including contracts and airfield contracts. After said examination, such representative told A. Cavazos and W. D. Tiner, then officers of defendant corporation, that some of its employees were covered by the Fair Labor Standards Act and that Defendant was not complying with the Act in that some of said employees were not being paid overtime in accordance with said Act. Defendant did not agree that it was in violation of any of the provisions of the Fair Labor Standards Act, but agreed to and did exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

III.

Answer to Written Interrogatory No. III.

In December, 1945, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period November 7, 1943, to December 31, 1945, during which period Defendant performed numerous contracts, including railroads, highways, and quarry operations from which gravel was produced, some of which gravel so produced was used in the performance of some of said contracts. After said examination, such representative told A. Cavazos that Defendant's sand and gravel operations were covered by the Fair Labor Standards Act and that Defendant was not complying with said Act. Defendant did not agree that such operations were covered by said Act, nor did Defendant believe then nor now that it was in violation of any of the provisions of said Act according to the then current decision of the Supreme Court on the subject, McLeod vs. Threlkeld, et al., 319 U.S. 491, 63 S. Ct. 1248, but did agree to operate said sand and gravel plant as though all such operations were covered by the Act from and after January 1, 1946.

IV.

Answer to Written Interrogatory No. IV.

In October, 1950, and October, 1951, representatives of the United States Department of Labor were permitted to examine the payroll records of Defendant covering
171 the period of October 22, 1948, to October 18, 1951, during which period Defendant performed various and sundry types of construction contracts, including the construction of electric power lines. After these examinations said representatives told A. Cavazos that the office manager on said power line construction contract regularly worked in excess of 40 hours per week and that he was paid a regular salary without additional compensation for overtime. Defendant, without admitting liability and without agreeing that said office manager was covered by the Fair Labor Standards Act, at the request of such representative, paid said office manager the sum of $241.50. Defendant at such time was exercising and continued to

exercise caution to avoid any infraction of the Fair Labor Standards Act in its operations.

V.

Answer to Written Interrogatory No. V.

In August, 1955, a representative of the United States Department of Labor was permitted to examine Defendant's payroll records covering the period from February 5, 1955, to August 7, 1955, during which period Defendant was engaged in the performance of a construction contract for the Gulf, Colorado and Sante Fe Railway Company between Sanger, Texas, and Dallas, Texas, employing some 250 men; and after examination, such representative told Al Downey, project superintendent, and later E. M. Hammond, personnel director of defendant corporation, that certain mechanics employed on said job were covered by the Fair Labor Standards Act and that said employees were not being paid overtime in accordance with the Act. Whereupon, Defendant made restitution to the mechanics involved, pointing out that the error of paying the mechanics a weekly salary instead of an hourly rate for hours worked was made in the field.

VI.

Answer to Written Interrogatory No. VI.

In March of 1957, a representative of the United States Department of Labor was permitted to examine the
172 payroll records of Defendant covering the period October 28, 1956, to April 6, 1957, during which period Defendant was performing a pipeline construction contract for Texas Eastern Transmission Corporation covering the construction of a pipeline from a point at the Mexican border near McAllen, Texas, to a point at Texas State Highway No. 35 near Angleton, in Brazoria County, Texas, employing some 675 men. Defendant was informed that 13 employees on said pipeline construction job were not being paid overtime in accordance with the Fair Labor Standards Act. This was brought to the attention of A. Cavazos and Chester H. Johnson, whereupon, restitution was made to such employees. This is another example of

errors being made in the field without the knowledge or consent of the officers of defendant corporation, since it was and is the intention of Defendant to pay said employees according to the Act whether covered thereby or not.

VII.

Answer to Written Interrogatories Nos. VII, VIII and IX.

The answers to these interrogatories appear in each of the answers hereinabove.

VIII.

Answer to Written Interrogatory No. X.

(a) Defendant is engaged generally in the construction business and since the year 1946, has bid on and had awarded to it various types of construction contracts, including highways, railroads, power lines, and water systems.

(b) Defendant intends in the future to continue to bid on and perform such contracts as are awarded to it.

CHESTER H. JOHNSON
Chester H. Johnson

SIDNEY CALLENDER
Sidney Callender

JOHNSON, HITE & CALLENDER
1109 Transit Tower
San Antonio, Texas

ALLEN WOOD
Allen Wood

FISCHER, WOOD, BURNEY & NESBITT
1903 Driscoll Building
Corpus Christi, Texas
Attorneys for Defendant

173 *Duly sworn to by Chester H. Johnson*

(Jurat omitted in printing)

Proof of Service

(Omitted in printing)

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176 **Minute Entry of Argument and Submission—November 11, 1958**

(Omitted in printing)

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177 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17311

H. B. ZACHRY COMPANY, *Appellant-Appellee,*

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Appellee-Appellant.*

(And Reverse Title)

Appeals from the United States District Court for the Southern District of Texas

Before TUTTLE, JONES and WISDOM, Circuit Judges

Opinion—January 5, 1959

TUTTLE, Circuit Judge: H. B. Zachry Company is a Texas corporation engaged in large construction projects. During its existence it has completed more than 1200 of a value of over $300,000,000. More than $78,000,000 worth of construction work was completed by this company during the three years preceding the trial. These projects include the building of highways, railroads, power lines, dams, and water systems. It was under contract with the Lower Nueces Water Supply District to build
178 a dam for the purpose of providing a water reservoir approximately ten times the size of that previously existing. The District was under contract to furnish

water exclusively for the City of Corpus Christi, Texas. The dam, known as the Mathis Dam, is some 1500 feet downriver from an older dam which would be inundated upon the completion of the new construction.

Industries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce.

Investigation by the Wage and Hour Division of the Department of Labor disclosed, without dispute, that certain construction employees of Zachry Company were not paid in accordance with the minimum wage requirements of the law—that is they were not paid time and a half for overtime beyond forty hours per week, unless the overtime hours occurred on days on which the employees worked more than eight hours, or unless they worked on Sunday. Following this investigation, the Secretary filed suit against Zachry seeking a temporary and permanent injunction against such alleged violation of the Wage and Hour law.

The trial court held a hearing on the motion for preliminary injunction, and although expressing the tentative view that the activities of the construction workers were covered by the Act, it declined to enter a temporary injunction pending at full development of the case on final trial. At the later trial the Court adhered to its
179 view that the workers were covered by the Act, and granted an injunction as to the construction employees on the particular project only, stating when it did so that Zachry's president had estimated the project would be finished in thirty days. It elsewhere appeared in the record that the job was substantially completed.

Zachry Company appealed on the ground that the construction workers on this project were not covered by the applicable section of the Wage and Hour Law.[1]

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[1] 29 U.S.C.A. 207(a) provides as follows:

"Except as otherwise provided in this section, no employer shall employ any of his employees who engaged in commerce, or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours

The Secretary of Labor filed a cross appeal contending that the trial court erred in not granting a general injunction against Zachry prohibiting violation of the terms of the Act as to all future activities of the company.

The Secretary concedes that the construction workers were not engaged "in commerce." If, therefore, his views are to prevail it must be on the basis of their being engaged "in the production of goods for commerce." Since obviously they are not actually, while building the
180 dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed "in [a] closely related process or occupation directly essential to the production" of goods.

Although this is a much litigated field, we find no decision of the Supreme Court, and only one Circuit Court opinion in which this definition is sought to be applied to a state of facts closely similar to those here presented.[2] There are certain general pronouncements of the Supreme Court, however, which serve as guide posts to us in our attempt to apply this statute. The first of these is that this statute should be given a liberal construction, *Mitchell* v. *Vollmer,* 349 U.S. 427, 429. The second is that the scope of the Act is not co-extensive with the power of Congress over commerce. *Kirchbaum* v. *Walling,* 316

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above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 U.S.C.A. 203(j) reads:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

2 It is to be noted that this definition was changed by an amendment to the statute in 1949. Prior to that amendment the relevant par of the definition was that an employee should be deemed engaged in the production of goods if such employee was employed "in [a] process or occupation necessary to the production" of goods.

U.S. 517. As stated in *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578, "in enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g. the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce." A further general principle is that which requires courts to undertake, if possible, to understand the purpose sought by Congress in adopting an amendment to a statute which has already been the subject of much judicial construction.

181 As to the first general principle above enunciated, we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress. We think that this Court has consistently followed the rule of liberal construction. Recent decisions of this Court, we think, evidence its purpose to apply the language of the statute liberally in areas of doubt. In discharging what the Supreme Court in *10 East 40th Street Building, Inc.* v. *Callus, supra,* calls its "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations," this Court has held subject to the Act, because engaged in commerce, employees of a contractor engaged in building a new building for a radio broadcasting station, *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, employees engaged in the construction of a field plant for production of materials essential to the construction of a causeway to become a link in an interstate highway system, *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663, and employees engaged in the construction of bulk jet fuel storage tanks and fueling systems at an airport for the United States Air Force, *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, in which this Court stated "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

182 Regarding the second general principle, we think it plain both from the legislative history and the many

court decisions emphasizing the fact, that not every activity that in any way affects commerce, and not every activity that in some way leads ultimately to the production of goods for commerce, is intended to be included within the terms of the statute. The law as it stood before the 1949 amendment was itself somewhat restricted, in that an employee, to come within the act, must be employed in a process *necessary* to the production of goods to have a covered status. As stated by the Supreme Court in 10 East 40th Street Building, Inc., *supra:*

> "The series of cases in which we have had to decide when employees are engaged in an 'occupation necessary to the production' of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See Walling v. Jacksonville Paper Co., 317 U.S. 564; Walton v. Southern Package Corp., 320 U.S. 540; Armour & Co. v. Wantock, 323 U.S. 126; Skidmore v. Swift & Co., 323 U.S. 134. In giving a fair application to § 3(j), courts must remember that the 'necessary' in the phrase 'necessary to the production' of goods for commerce 'is colored by the context not
> 183 only of the terms of this legislation but of its implications in the relation between state and national authority'. Kirschbaum Co. v. Wallings, supra, at 525. For as was pointed out in Walling v. Jacksonville Paper Co., supra, at 570, we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protion of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word "necessary" to the term "directly essential," and by adding also the words "closely related" to modify the word "occupation." Reference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add to rather than detract from the class of employees to be considered engaged in local enterprises.

Obviously, an occupation might be necessary to the production of goods for commerce which is not closely related to production, and which even if closely related is not directly essential to production. Undoubtedly the employees who haul concrete to the dam site; those who clear the site; those who build the frames for the work and who actually pour the concrete or grade the earthen dam, are links in the "long chain of causation which brings about so complicated a result as finished goods."

184 The courts have consistently held, however, that those engaged in building a plant to be used for the manufacturing of goods do not even come within the more liberal requirement of the old statutory definition of "necessary to the production of goods." *McDaniel* v. *Brown & Root*, 10 Cir., 172 F. 2d 466. As noted in footnote 4, page 471, of the opinion in that case by the Court of Appeals for the Tenth Circuit:

> "The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of the Supreme Court in Murphy v. M. T. Reed, et al, 335 U.S. 865, S.Ct. 105. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Ad-

vance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities, were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. The Supreme Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely
185 construction work and to reconsider the remaining causes of action in the light of the decisions in the case of Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S. Ct. 1031."

We think this analysis of the Murphy case is correct and that there is thus Supreme Court approval of the many cases of similar import from the Courts of Appeals. See *Reed* v. *Murphy*, 5 Cir., 168 F. 2d 257, affirmed as to construction workers in *Murphy* v. *M. T. Reed, et al., supra; Parham* v. *Austin*, 5 Cir., 158 F. 2d 566; *Noonan* v. *Fruco Construction Co.*, 8 Cir., 140 F. 2d 633; *Kelly* v. *Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555. These cases recognize that the rule they apply is in accord with the Interpretative Bulletin No. 5 of the Wage and Hour Division itself[3] expressing the view that employees engaged in the original construction of buildings ultimately used for production of goods for commerce are not within the scope of the Act. These cases all arose under the earlier definition. Certainly no broader coverage has been intended by the amendment of 1949. Moreover, the construction

[3] Wage and Hour Interpretative Bulletin No. 5, Paragraph 12, Dec. 2, 1938, revised Nov. 1939, reads: "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. . . ."

workers here are at least one more step physically removed from production than are workers building facilities which are to be used for manufacturing or assembling for commerce. Here the end product of the construction
186 work is the dam or, at most, the reservoir. These facilities then impound or contain water, which is then used in the manufacture of goods for commerce. As said in *10 East 40th St.* v. *Callus, supra:* "Remoteness of a particular occupation from the physical processes (of production) is a relevant factor in drawing the line."

Cases which apply the "engaged in commerce" provision of the Act are of course not applicable here. Thus we can derive little guidance in construing the definition section relating to production of goods for commerce from *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Mitchell* v. *Vollmer*, 349 U.S. 427.

The Court of Appeals for the Tenth Circuit and the Court in the Eighth Circuit in the two Chambers Construction Company cases, *Mitchell* v. *Chambers Construction Co.*, 10 Cir., 214 F. 2d 515, and *Chambers Construction Co.* v. *Mitchell*, 8 Cir., 233 F. 2d 717 expressed the view that construction workers engaged in repairing and enlarging a city's water supply were not engaged in original construction and that the definition of production of goods was broad enough to cover them. The first case did not need to, and did not, decide the issue, because it affirmed the lower court's refusal to grant an injunction, even though the court said "we are inclined to agree" with the Secretary's contentions. In the second case the Court equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra*, with construction of facilities to be used for production of goods. With all deference to the court, it is clear that
187 it did not support its conclusion by an analysis of the cases clearly recognizing the distinction between these two bases for coverage.

Applying, as we must, the declared intent of Congress to require a showing of something more clearly related to production and something more directly essential to production than had obtained under the earlier law, we cannot consistently hold that this construction work was a covered occupation because one closely related and directly

essential to the production of goods for commerce. This would not only amount to a reversal of our earlier decisions, but would also amount to narrowing the class of excepted occupations in the face of a Congressional mandate to broaden it.

We conclude that the record discloses that the occupations here involved were not covered under the Act.

The judgment is REVERSED for entry of judgment for appellant.

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188 IN UNITED STATES COURT OF APPEALS

No. 17311

H. B. ZACHRY COMPANY,

versus

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

(And Reverse Title)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

Judgment—January 5, 1959

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for entry of judgment for appellant, H. B. Zachry Company, in accordance with the opinion of this Court.

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189 Clerk's Certificate to foregoing transcript omitted in printing

No. , October Term, 1958

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Petitioner*,

vs.

H. B. ZACHRY COMPANY

Order Extending Time to File Petition for Writ of Certiorari—March 26, 1959

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 1, 1959

HUGO L. BLACK
Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 26th
day of March, 1959

No. 83, October Term, 1959

(Title omitted)

Order Allowing Certiorari—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆U S GOVERNMENT PRINTING OFFICE 1959—531720/P D 899

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 5, 1959.

OPINIONS BELOW

The memorandum decision of the District Court on the petition for preliminary injunction (R. 78–84) is not reported. The memorandum opinion of the District Court upon final disposition of the case (R. 131–142) is reported unofficially at 13 W.H. Cases 881. The opinion of the Court of Appeals (App., *infra*, pp. 31–40) is reported at 262 F. 2d 546.

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1959 (App., *infra*, pp. 40–41). By order of

Mr. Justice Black, dated March 26, 1959, the time for filing a petition for a writ of certiorari was extended to June 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent is a large construction contractor engaged primarily in the construction of industrial projects, including highways, railroads, airfield facilities, power lines, dams and water facilities. The employees involved here have been engaged in the construction of a six million dollar dam and reservoir (the physical construction part of a 15½ million dollar project), designed to inundate, replace and expand the existing dam and water facilities serving the industrialized city of Corpus Christi, Texas, and vicinity, in order to furnish "a much needed and more abundant source of water supply" to insure ability to meet present and increasing requirements. Between 40 and 50 percent of the total water furnished by the City has been to industrial users. A substantial proportion of the water furnished and to be furnished by the City is to interstate instrumentalities such as railroads, truck transportation companies and the airport, and to producers of goods for interstate commerce (which include "practically all of the major industries" in the City and vicinity).

The primary question presented is:

1. Whether respondent's employees engaged in the construction of this project were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

If the trial court was correct in ruling that this construction project was within the Act's coverage, another question presented is:

2. Whether an injunction restricted to this single project (construction of which was virtually completed by the time judgment was entered) is an adequate exercise of the judicial authority provided by Section 17 of the Act to restrain future violations, where the employer has violated the Act on other projects in the past and has not made, or agreed to make, restitution of substantial underpayments due employees for past violations.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are as follows:

> SEC. 3 As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.
>
> * * * * *
>
> SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of

his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

STATEMENT

1. The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act. Respondent is a large construction company, incorporated in Delaware with its principal office in San Antonio, Texas (R. 6, 22), engaged primarily in the construction of industrial projects such as highways, railroads, power lines, dams, and water facilities (App., *infra,* p. 31). In the three years before trial, it had completed a total of 185 projects valued at over $77,000,000, most of which projects

were concededly of an interstate character subject to the Fair Labor Standards Act (R. 140–141).

The project here in issue was a $6,170,378 contract (Plf. Exh. 7) for the construction of a dam and impounding facilities—the physical construction part of a project costing a total of 15½ million dollars (R. 41)—on the Lower Nueces River near Mathis, Texas, referred to in these proceedings as the Mathis Dam. Construction of the project continued over a period of approximately two years,[1] during which time a large number of construction workers, ranging from 85 to 400, were employed by respondent on the project (R. 22). Non-compliance with the overtime requirements of the Act with respect to these construction workers is undisputed, respondent contending that they were not covered by the Act (R. 79–80). The difference between the amounts paid to these employees and the amounts that would be due under the Act was estimated by the Government investigator to be in excess of $70,000 (R. 31), and conceded by respondent to be in the neighborhood of $50,000 (R. 123).

The trial court in its preliminary opinion (after a hearing on the Secretary's motion for a preliminary injunction) (R. 82–83) and again in its final opinion (R. 139) held that the Act was applicable. It declined, however, to enjoin the defendant with respect to future similar projects, limiting its injunction to the Mathis Dam project (R. 142, 143–144), which by the time of final judgment was virtually completed (R. 95).

[1] The contract for construction was dated October 1955 (Plf. Exh. 7) and work was scheduled to be completed by the end of 1957 (R. 37). It was more than 99 percent completed at the time of the trial on February 21, 1958 (R. 85, 95).

The Court of Appeals reversed the coverage ruling and held that the construction employees at the dam were not covered by the Act (262 F. 2d at 552; App., *infra*, pp. 31–40). Accordingly, it did not reach the issue, presented by the Secretary's cross appeal (R. 153), whether the trial court in limiting its injunction to the single (substantially completed) project, had exceeded the bounds of sound judicial discretion.

2. The facts pertinent to the question of coverage are not in dispute.

Respondent was under contract with the Lower Nueces River Water Supply District to build a dam some 1,400 feet downstream from the existing dam (R. 46), which would be submerged upon completion of the new dam, but protected and "maintained intact" until such completion so that the water supply from the existing dam and reservoir would not be interrupted (Plf. Exh. 7)—"to the end that the City [Corpus Christi, Texas] shall continue to have a supply of water uninterfered with by and during construction operations" (Plf. Exh. 1, p. 4). The project was designed "to furnish the City with a direly needed additional water supply to insure it the ability to meet its present requirements and for its future growth and development," by taking advantage of the City's right to impound more waters of the Nueces River, which could "not be realized by the present impounding facilities." The new dam would create a reservoir "of much greater capacity, offering to the City a much needed and more abundant source of water supply than that afforded by the present facilities" (*id.* p. 2).

According to the trial court's uncontested findings, "the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city" (R. 81). It was, the court found, "the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply" (R. 83).

The city water system serves a district with a population of approximately 200,000, including the industrialized city of Corpus Christi, with a population of approximately 165,000 (R. 51). Among the industries served by, and dependent upon, the city water system are railroads, truck transportation companies, the airport and other instrumentalities of interstate commerce (R. 56–57), and various producers of goods for commerce (R. 61–65). It is conceded that "practically all the major industries in this area" sell their products in interstate commerce (R. 62) and there "is no dispute that these industries use a large quantity of water" (R. 63). Corpus Christi is "an important oil refining and shipping center on the Gulf Coast [whose] industries include cotton compressing, textile manufacturing, canning, production of sheet metals and chemicals,"[2] carbon-black manufacturing, zinc refining, foundries, alkali-chemicals and cement plants, cotton ginning, cottonseed oil mills, and the manufacture of oil-field supplies and paint.[3]

[2] See Moody's *Governments & Municipals, 1958*, p. 1656.

[3] See The Columbia Lippincott Gazetteer of the World (Columbia Univ. Press, 1952); p. 452.

The trial court found that "A substantial amount of water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce" and "largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce" (R. 81). More particularly, the City's water consumption records show that from 40 to 50% of the total volume of water furnished by the City's existing system during the two years preceding the trial of this case was to industrial users (as distinguished from residential, commercial, hospital, municipal, and other users), and that the amount furnished industrial users averaged more than half a billion gallons a month (Plf. Exh. 6).

On the basis of these facts, the District Court concluded that the construction project, "while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished by technical conceptions, it is at once an improvement, a rebuilding and a new construction" (R. 83). Accordingly, it held the work on the dam was "so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity" (*ibid.*).

3. The Court of Appeals, although recognizing that "[i]ndustries in and around Corpus Christi used large quantities of water from the present water system and

reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce" (App., *infra*, p. 32), reversed the District Court and ruled that the construction work was not covered by the Act because not "closely related" and "directly essential" to the production of goods for commerce within the meaning of Section 3(j), as amended in 1949 (*supra.* p. 3).

The reasoning of the Court of Appeals was that, prior to the 1949 Amendments, it had been "consistently held" that employees engaged in the "original construction" of buildings or facilities were not within the coverage of the Act even if the building or facility when completed would be used in the production of goods for interstate commerce, that "[c]ertainly no broader coverage has been intended by the amendment of 1949," and that "[r]eference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add rather than detract from the class of employees to be considered as engaged in local enterprises" within the rationale of the *Callus* decision (*10 E. 40th St. Bldg., Inc.*, v. *Callus*, 325 U.S. 578). (App., *infra*, pp. 36–39.)

REASONS FOR GRANTING THE WRIT

I

The decision below, both in its result and in its reasoning, conflicts directly with the ruling of the Eighth Circuit in *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, as well as with the considered view expressed by the Tenth Circuit in *Mitchell* v. *Cham-*

bers Construction Co., 214 F. 2d 515. The reasoning below—particularly in its application of the technical "new construction" doctrine to the "production of goods for commerce" aspect of the coverage of the Fair Labor Standards Act, and in its assumption that the 1949 amendment to Section 3(j) was designed to exclude all such construction from the Act's coverage as "local" enterprise—is also inconsistent with opinions of this Court, subsequent as well as prior to the 1949 Amendments, as well as contrary to the 1949 legislative history specifically approving prior pertinent judicial decisions.

The issue presented is of substantial importance, not only because of the large and growing number of similar water construction projects throughout the country, but also because of the far-reaching implications of the rationale of the decision which if unreviewed will tend to confuse and unsettle other long-standing interpretations of the Act's "production" coverage.

1. As the court below explicitly recognizes (App., *infra*, pp. 39–40), its decision is in direct conflict with the Eighth Circuit's decision in *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, and with the "expressed * * * view" of the Tenth Circuit in *Mitchell* v. *Chambers Construction Co.*, 214 F. 2d 515.

(*a*) The Eighth Circuit decision (decided June 5, 1956) upheld coverage of employees engaged in the construction of a new water main to replace and expand part of the existing municipal water system of the city of Beatrice, Nebraska, whose customers, as here, included railroads, and industrial firms using the water in various ways to manufacture

products sold in interstate commerce. The decision rested on the ground that employees engaged in "replacement improvement" of such a facility, which regularly and substantially serves the needs of interstate instrumentalities and interstate producers, are engaged in a "closely related process or occupation directly essential to the production [of goods for commerce]" within the meaning of Section 3(j) of the Act as amended in 1949 (233 F. 2d at 722).

The court below rejected the Eighth Circuit's views in the *Chambers* case. Noting the Eighth Circuit's discussion of *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, in which the Act was held to cover "new construction" of an alternative link in an existing waterway system, the Fifth Circuit rested its disagreement on the ground that the Eighth Circuit had "equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra;* with construction of facilities to be used for production of goods," and that it had failed to recognize "the distinction between these two bases of coverage" (App., *infra,* pp. 39–40). This Court's rejection of the "new construction" doctrine in *Vollmer,* the Fifth Circuit reasoned, was limited to the "in commerce" aspect of coverage, and therefore afforded "little guidance in construing the definition section relating to production of goods for commerce" (App., *infra,* p. 39).

In contrast, the Eighth Circuit, "[w]hile conceding the distinction" between "improvements to interstate instrumentalities" (with which *Vollmer* dealt) and "facilities * * * used to produce goods for interstate

commerce" (with which *Chambers* was concerned), expressly held that the difference was not significant so far as the application of the "new construction" doctrine is concerned (233 F. 2d at 722). It noted the breadth of the statutory language in Section 3(j) defining the scope of the Act's "production" coverage (*supra*, p. 3), and pointed out that, even prior to *Vollmer's* rejection of the "new construction" doctrine as applied to "in commerce" coverage, the broader scope of "production" coverage had been recognized to encompass "replacement-improvement" construction (*ibid.*). It held that *Vollmer* only confirmed for the "in commerce" field the principle theretofore established "that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*" (*id.* at 721–722; emphasis the court's).[4]

(*b*) The Tenth Circuit's earlier *Chambers* case, which was decided prior to this Court's *Vollmer* deci-

[4] The Fifth Circuit's assumption that "replacement-improvement" projects were recognized as noncovered "original construction" by the pre-1949 administrative Interpretative Bulletin (Wage and Hour Interpretative Bulletin No. 5, Dec. 2, 1938, revised Nov. 1939), and by the pre-1949 "original construction" court decisions (App., *infra*, p. 38) is squarely opposed to the Eighth Circuit's explicit ruling that "the words 'original construction' in the interpretative bulletin contemplated a different situation than replacement or repairs * * * thus making reliance on that bulletin in this instance ill-advised" (233 F. 2d at 722), and that, insofar as "the *Vollmer* decision infers that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*" (emphasis the court's), it was "not a change in the law" but "has been true ever since the F.L.S.A. was passed in 1938" (*id.* at 721). See also, *infra*, p. 18, fn. 10.

sion, involved employees engaged in the construction of a new reservoir and chlorinator house designed to connect with and substantially augment the water system of the city of Cheyenne, Wyoming, which, like the Corpus Christi system, furnished large quantities of water both to interstate instrumentalities and to industries engaged in the production of goods for commerce. The primary issue on appeal was coverage, and the Court of Appeals, after fully discussing the facts and the authorities on this issue, expressed agreement with the Labor Department's view that the employees were engaged in constructing "an addition to or enlargement of an existing water system to meet its expanding needs", and that therefore the "original construction" concept was inapplicable. Although the court's actual decision rested on the ground that its position on coverage was "not decisive of the ultimate question whether the trial court abused its discretion in denying an injunction" (214 F. 2d at 517), its view on the coverage issue, after full and elaborate consideration, is entitled to more authoritative weight than mere dictum.[5] Cf. *Railroad Companies* v. *Schutte,* 103 U.S. 118, 143. Indeed, the Fifth Circuit itself, in a prior decision by a different panel, cited the Tenth Circuit's *Chambers* decision as authority for its ruling that a new building constructed as "an improvement of an existing facility—an operating radio station" is within the coverage of the Act "in any vintage," and that *Vollmer,* "decided sub-

[5] The Fifth Circuit summarily dismissed the Tenth Circuit's decision as one which "did not need to, and did not, decide the issue" (App., *infra*, p. 39).

sequent to the Trial Court's action, made it [coverage] doubly sure." *Mitchell* v. *Hodges*, 238 F. 2d 380, 384 (C.A. 5).

2. In rejecting the *Chambers* cases as wrongly decided, the decision below proceeds upon premises inconsistent with the correct principles for determining this Act's coverage.

(*a*) The view that *Vollmer's* rejection of the "new construction" concept relates only to the Act's "in commerce" coverage disregards the principle on which that holding rests. While *Vollmer* was concerned with a project involving the Act's "in commerce" coverage, reliance was placed on two "production" decisions (*Kirschbaum* and *Alstate*[8]) to support its specific ruling that the Act's coverage is not to be controlled by the "new construction" concept (derived from decisions under an Act "of another vintage") (349 U.S. at 429).[9] *Vollmer's* ruling that "in commerce" coverage is to be "determined by practical considerations, not by technical conceptions" is, in our view, contrary to the inference drawn by the court below that the "production" phase of the Act's coverage may be determined by such "technical conceptions."

In rejecting "technical conceptions," *Vollmer* was following this Court's prior rulings. *Kirschbaum*,

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[8] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[9] It seems of some significance that the *Vollmer* opinion, throughout, invariably speaks in terms of "an instrumentality or *facility* of interstate commerce" (emphasis added), as does the more recent *Lublin* opinion, 358 U.S. 207.

one of the earliest decisions on coverage, had established that no "dependable touchstone" or "rigid formulas" or "general propositions" could be used to determine "whether employees are 'engaged in commerce *or in the production of goods for commerce*,'" but that "the larger considerations of national policy, legislative history, and administrative practicalities * * *" must govern the judicial construction of Section 3(j) (316 U.S. at 520, 523, 526, emphasis added). Other "production" decisions had emphasized the national social purposes of the Act and the broad statutory coverage definitions, which were plainly designed to achieve the "[b]readth of coverage * * * vital to its mission" and must be construed by "practical judgment" not by any "hard and fast rule" (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 665). *Kirschbaum's* covering of employees of an independent company furnishing building space and maintenance to interstate producers, and *Roland's* covering of employees of an independent enterprise engaged in repairing and reconstructing motors for use in the production of goods for commerce, rested on the ground that the work of the employees had a "close and immediate tie with the process of production for commerce" and was "an essential part of it" (316 U.S. at 525–526; 326 U.S. at 665; see also *Callus*, 325 U.S. at 584)—a test which is virtually identical to the "closely related * * * directly essential" language of the 1949 Amendments, *supra*, p. 3; *infra*, pp. 19–22. And, since *Vollmer*, the Court has reemphasized this

"practical test" for coverage. *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 212 (involving "in commerce" coverage).

The teaching of this line of decisions, we submit, is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 499; emphasis added), but, rather, whether the relationship of the work to the "end [interstate] product" (see *Lublin*, 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.[8]

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[8] The interpretative bulletin on coverage of the construction industry issued in July 1956 and currently in effect (29 C.F.R. Part 776, Subpart B), on the basis of the *Vollmer* and *Kirschbaum* decisions, states the administrative position to be that "Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula" but that "both phases * * * must be given 'a liberal construction' determined 'by practical considerations, not by technical conceptions'"; that the "new construction" concept would not serve as a reliable test for determining coverage; and that "[s]o far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of 'in commerce' coverage in substantially similar language as they have used in construing the 'production' phase of coverage" (*id.*, Section 776.22). "Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is 'new construction' nor the fact that it is physically separated from an existing covered plant, is determinative" (*id.*, Section 776.26).

(*b*) We do not believe that such a realistic and practical reading of the Act's "production" coverage is precluded by *Murphey* v. *Reed,* 335 U.S. 865. That short *per curiam* order (by a closely divided Court) gives no explicit indication of its grounds; it was issued before the question of the applicability of the "new construction" doctrine to this Act had been directly or adequately presented for judicial consideration; and the summary disposition of that employee's suit was in a context confused and overshadowed by an inadequate record and many other issues.* *Vollmer's* characterization of *Murphey* v. *Reed,* as involving "the building of a Navy base, not the improvement of a facility or an instrumentality of interstate commerce" (349 U.S. at 430, fn. 2), has left some area of doubt as to the application of the "new construction" doctrine, but, we submit, that doubt has been erroneously resolved in this case by the court below.

As applied to the present case, the Fifth Circuit's construction of *Murphey* v. *Reed* is inconsistent, at the least, with the recent *Lublin* ruling that "[w]hatever vitality the 'new construction' doctrine retains [after *Vollmer* and *Gileo, supra*], it is not applicable * * * [to] projects involv[ing] the repair, extension

* As the Fifth Circuit itself noted in its second decision in *Murphey*, after remand, "many complex important additional matters" were "not reached or passed on" by this Court's *per curiam* order (232 F. 2d 668, 671). Also, in its earlier opinion the Fifth Circuit had pointed out the inadequacy of the record, stating that the material facts had to be "dredged up from the record which [was] in many respects vague and uncertain," and plaintiffs had "wholly failed to discharge their burden of proving" the connection of their work with interstate commerce (168 F. 2d 257 at 259, 261).

or relocation of existing facilities" (358 U.S. at 213).[10] And as the Tenth Circuit said, in distinguishing construction of a multi-purpose dam and reservoir project from decisions like *Murphey* v. *Reed*: "* * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. * * * It does not follow from the mere construction of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable" (see *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, 336, certiorari denied, 345 U.S. 915). As in *Pennington-Winter*, there is no question here that the dam and reservoir, by its mere construction, be-

[10] The "new construction" doctrine had been judicially held inapplicable, prior to the 1949 Amendments, to "new construction" of buildings, machinery and facilities designed to replace, improve or enlarge existing production facilities in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (Nov. 25, 1946), approved by Congress, *infra*, pp. 20, 22.

All of the pre-1949 decisions relied upon by the Fifth Circuit below rested on the ground that solely "original construction," as distinguished from improvements, replacements and extensions of existing facilities, was involved (*e.g.*, *McDaniel* v. *Brown & Root*, 172 F. 2d 446, 471 (C.A. 10), on which the Fifth Circuit placed main reliance, specifically distinguished "work of repairing an existing building or facility or in constructing replacements of, or additions to, an existing building or facility;" similarly, *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3), specifically distinguished the type of "extension of current facilities" involved in the *McCrady* case; see also this Court's reference in *Vollmer* (349 U.S. at 430), distinguishing the construction work in *Murphey* v. *Reed*, 335 U.S. 865, from "work of improving existing facilities of interstate commerce").

comes unavoidably dedicated to the functioning of interstate instrumentalities and interstate production facilities, and is so designed, in size and location, that it is certain not to be "dedicated solely for intrastate commerce."[11]

(*c*) Moreover the Fifth Circuit's assumption that the "production" phase of coverage is to be more narrowly construed than the "in commerce" phase is clearly contrary to this Court's pre-1949 decisions expressly recognizing the *greater breadth* of "production" coverage. See *Armour & Co.* v. *Wantock,* 323 U.S. 126, 131; *McLeod* v. *Threlkeld,* 319 U.S. 491. See also *Tobin* v. *Girard Properties,* 206 F. 2d 524 (C.A. 5) (post-1949 case). And the basic premise of the decision below—that the 1949 amendment drastically narrowed the scope of "production" coverage—is contradicted by the legislative history of that amendment.

As stated by the chairman of the House Committee: "The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942, October 18, 1949). Similarly, the Statement of the Majority of the Senate Conferees pointed out that the language was not intended to substantially change or limit the decisions construing the

[11] It seems quite likely that *Murphey* v. *Reed* was regarded as involving only the initial construction of buildings, barracks, mess halls, warehouses, recreation halls and similar installations appropriate for a temporary encampment, which might or might not be dedicated to interstate use, depending on the exigencies of war.

prior "necessary"-to-production language, but rather to "provide more certainty in this field," and specifically stated that the amended language "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). "This [amendatory] language," the Senate report continued, "is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous" and "contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods" (*ibid.*).

Supplementing these general statements of legislative purpose, the Senate report lists, in detail, specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language. Among the decisions so listed were *Kirschbaum, Roland, Armour* v. *Wantock,* and *McCrady* (*supra,* pp. 15, 18, 19); as well as numerous other decisions of lower federal courts, including rulings upholding coverage of employees engaged in "[p]roducing and supplying fuel, power, *water,*[12] or

[12] Among the pertinent decisions explicitly approved in the legislative reports was *Reynolds* v. *Salt River Valley Water Users Ass'n,* 143 F. 2d 863 (C.A. 9), which upheld the coverage of employees of a water irrigation enterprise engaged in the maintenance of the facilities supplying water for irrigation to farmers who produced crops, some of which were destined for subsequent shipment in interstate commerce (95 Cong. Rec. 14875).

other goods for customers using such goods in the production of different goods for interstate commerce," and including "[e]mployees repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods * * * *whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer*" (95 Cong. Rec. 14874–75; emphasis added).[13]

The House Managers' Statement, while not so detailed regarding the extent to which prior judicial interpretation of "production" coverage would remain unchanged, also confirms the limited nature of the change, expressly stating that the amendatory

[13] The examples cited in the Senate report to illustrate the type of activities which would *not* be covered under the amendatory language also confirmed the limited effect intended by the amendment—*viz.* "the procurement of land for a new factory or the manufacture of brick for its buildings," or "employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce" (as distinguished from "employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production," which, it was expressly stated, would remain covered) (95 Cong. Rec. 14874). In contrast to the numerous court decisions specifically approved by the Majority Senate Report, not a single specific judicial decision or administrative interpretation on coverage was disapproved. It is evident that the amendatory language was viewed by the Majority Senate Conferees simply as a measure to counteract the fears or possibility that it "might be argued" that coverage extended to such "remote or tenuous situations," since "[t]he definition in the present act provides no clear cut-off preventing *extension* of the coverage of the Act" to such extremes (*ibid.*; emphasis added).

language would not affect the coverage of employees such as those involved in *Kirschbaum* or employees "who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" or "employees of public utilities, furnishing gas, electricity *or water* to firms within the State engaged in manufacturing, producing, or mining goods for commerce," all of whom "will remain subject to the act" as "doing work that is closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14928–29).[14]

[14] The legislative history shows that the 1949 amendment was *not* intended to add to the class of non-covered "local enterprises" such enterprises as power and water utilities (see *supra*, pp. 20–21), or construction companies engaged in "improving or enlarging the buildings, equipment or facilities of producers of goods" (*Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), discussed *supra*, p. 18), or companies engaged in the "[p]roduction of tools, dies, designs, patterns, machinery * * * or other equipment used by purchaser in producing goods for interstate commerce", or companies engaged in furnishing watchmen, or maintaining burglar alarm systems, or providing other protective services to producers of goods for commerce. See Statement of Senate Conferees, 95 Cong. Rec. 14874–14875; Statement of House Managers, 95 Cong. Rec. 14929.

10 East 40th Street Building, Inc. v. *Callus*, 325 U.S. 578—on which the court below relies heavily—involved building maintenance employees of an independent enterprise engaged exclusively in "running an office building" rented to the general miscellany of tenants for offices, some of which "may, for the time being, be [the executive or sales] offices of manufacturing enterprises" engaged *elsewhere* in the physical production of goods for commerce (325 U.S. at 583–584). In marked contrast to the instant case, there was no evidence that the maintenance of the building had any direct or essential or regular relationship to the functioning of any specific interstate instrumentalities or interstate producers. Even on the "thin" evi-

(*d*) Finally, the court's statement that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (App., *infra*, p. 33) ignores the practical engineering fact that the very construction of the dam project impounds or "produces" the water ("goods"), just as coal, natural gas and oil are captured or "produced" by digging or drilling.[13] Since admittedly the construction work was designed to supply water essential

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dence in *Callus*, the Court found the question of coverage to be a very close one.

Certainly, respondent Zachry's business as a whole, in contrast to the *Callus* enterprise, cannot qualify as a "local enterprise," by any stretch of the imagination, since the bulk of its work (over 96% during the past three years of a total of 178 jobs, and almost 85% of a total dollar volume of over $77 million) is concededly of an interstate character subject to the Fair Labor Standards Act, including highways, railroads and power lines, as well as water systems (R. 140–141; Gov't. Exh. I—Answer to Interrogatories VIII).

[13] See *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, where the Fifth Circuit held that the operator of a rotary drilling rig and the members of his crew, who performed the preliminary drilling of holes short of oil producing sand, "if not engaged in mining for and the production of oil, within the meaning of the act, *as actually mining and producing the oil, and we think they were*, were certainly engaged in processes or occupations necessary to the production of oil" (at p. 44; emphasis added). This Court, in affirming (317 U.S. 88), ruled that "[w]hether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining—*and we certainly are not to be understood as intimating that they may not*—recognition of the obvious requires us to hold that, *at the very least*, they were engaged in a 'process or occupation necessary to the production' of oil," *since "those activities certainly bear as 'close and immediate tie' to production as did the services of the building maintenance workers held within the Act in Kirschbaum Co.* v. *Walling* * * *" (at p. 91; emphasis added).

to the functioning of interstate instrumentalities (as well as to producers of goods for interstate commerce), the construction workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for use in the construction of interstate highway improvements in *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see the decisions cited with approval in *Alstate,* 345 U.S. at 16, fn. 4).[16]

3. The importance of the coverage question here presented extends far beyond employment on water-supply construction projects. The basic premises of the decision below—particularly its broad application of the "new construction" doctrine, and its misconcep-

[16] As noted above (*supra*, p. 8), the District Court found that water impounded by the dam would become an "ingredient" of goods moving in interstate commerce. This finding was apparently based upon judicial notice of the water content of products manufactured by various industries in Corpus Christi. Since the Government did not undertake to present evidence that the water became an ingredient of any products, this was not urged below as a ground for coverage, and the trial court's final opinion, at the close of the trial on the merits, made no reference to the "ingredient" point, resting its decision on the "closely related * * * directly essential" language of Section 3(j). The Court of Appeals, in reversing the District Court's holding of coverage, clearly gave no consideration at all to the "ingredient" point.

While this ground for coverage has not hitherto been pressed in this case, we believe that the evidence in this record, supplemented by facts of common knowledge or authoritative publications properly subject to judicial notice, would make reliance upon this ground of coverage appropriate; if certiorari is granted we shall develop the point.

tion of the effect of the 1949 amendment to Section 3(j) of the Act—not only affect construction workers on a wide variety of other projects for the expansion, improvement or replacement of industrial production facilities, but have far-reaching implications on the scope of "production" coverage generally. If left unreviewed, the decision will, we believe, confuse and unsettle many long-standing administrative interpretations which are predicated on a different conception of this Court's decisions and of the effect of the 1949 amendment, with consequent loss to numerous employees of the important remedy provided by Section 16(c) to recover wage claims.[17]

Even if the impact of the decision below were limited to employment in the enlargement of water-supply facilities, the coverage issue would be of substantial importance. There is a considerable and fast-growing demand throughout the country for additional supplies of water, a trend which is expected to require, by 1975, more than twice the amount of water now being used (*Natural Resources,* from "The Challenge to America: Its Economic and Social Aspects," a Special Studies Report of the Rockefeller Bros. Fund, 1958, printed in pertinent part at 105 Cong. Rec. 1049). This pressure for expansion of the nation's water-supply facilities reflects not only the growth of the population, but also the increase in the nation's industries and the additional demands of

[17] The Section 16(c) remedy, enacted by the 1949 Amendments, cannot be used "in any case involving an issue of law which has not been settled finally by the courts * * *."

newly developed industrial processes. American industry, according to the latest estimates of the United States Department of Commerce, used more than ten times as much water in 1955 as it did in 1900, and almost half as much again as it did in 1950, consuming in 1955 roughly 45% of the total water supply (Business Services Bulletin No. 136, "Water Use in the United States, 1900–1975," table 1). Its proportionate use of the water supply is also climbing. "Use of water by industries and utilities is the fastest-growing segment of [the Nation's] water consumption" (*America's Water Needs: Their Investment Significance,* Domenick & Domenick, N.Y., May 1957 pp. 4–5).[18]

[18] In absolute figures, the amounts of water consumed in industrial operations is enormous. Electric utilities alone consume 60 billion gallons daily in the steam generation of power, using 75 gallons for each 1,000 kilowatt hours; and a single large steel mill may alone consume 500 million gallons a day (*ibid.*). The manufacture of a ton of rayon requires 300,000 gallons of water, and the United States turns out 600,000 tons of rayon a year (*Natural Resources, supra*). As the production of kilowatt hours of power, and tons of steel and rayon and other water-consuming products increase, along the well-known current projections of established trends, these figures of water consumption will swell correspondingly. "The recent and current industrial expansion * * * has resulted in a tremendous increase in the total withdrawal of water * * *. This increase in industrial water requirement has strained the capacity of the developed water supplies in many areas * * *." U.S. Geological Survey, *Water Requirements of the Pulp and Paper Industry*, Washington, D.C., 1957, p. iii. The continuing extent of the strain is indicated by the estimate, noted above, that by 1975 "the increase in our population, coupled with the growth of industries which require large quantities of water, will more than double the current rate of water consumption" (*Natural Resources, supra*).

II

While the appellate court below did not reach the issue presented by the Secretary's cross-appeal to that court—*i.e.*, whether the trial court erred in limiting injunctive relief to the single construction project which led to the institution of this suit, rather than granting an injunction restraining future violations on similar projects—this question will necessarily arise if the decision below is reversed on the coverage question. This is, also, an issue of general importance in the enforcement of the Act, and particularly in the region within the jurisdiction of the Fifth Circuit where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required.

Though we recognize that the grant or denial of injunctive relief is a matter within the sound discretion of the trial court, the standards which have been adopted by the Fifth Circuit as warranting denial of injunctive relief exceed, we believe, the bounds of legal discretion. In particular, the Fifth Circuit has announced that a Section 17 injunction imposes "substantial disadvantages" on the employer "without at the same time giving the enforcement agency any real substantial benefit", and that "right to challenge substantial questions of coverage ought to be freely open to good faith litigation by an employer unfettered, in that process, by the prospect of contempt proceedings" (*Mitchell* v. *Hodges*, 238 F. 2d 380, 383). See also *Mitchell* v. *Bland*, 241 F. 2d 808 (C.A. 5). This has resulted in a disregard of the public interest and of the co-ordinate duty which the statute imposes upon the

courts to aid in the enforcement of the national policy—imposing on the Government the burden and expense of repeated investigations of and litigation with the same employers.[19]

[19] Section 17, as amended in 1949, expressly deprived the courts of jurisdiction, in an original injunction action by the Secretary, to order payment of unpaid wages resulting from past violations (*supra*, p. 4). Because of this limitation, an injunction issued thereunder is a peculiarly mild remedy, ordering nothing more than *future* compliance with requirements imposed by the statute itself, without the ordinary equity remedy of restoration of unlawfully acquired gains. Unless and until an injunction is issued, an employer stands a good chance of retaining financial benefits resulting from noncompliance. As this Court noted in *Lublin:* "We fail to see what undue burden will be placed on respondent by the issuance of an injunction * * *" (358 U.S. at 214). The plain fact is that the injunction imposes no disadvantage on an employer with good faith intentions to comply in the future. It serves as little more than a warning order that the court will be in a position to order restoration of underpayments resulting from *future* violations, since the proviso in Section 17 prohibiting back pay orders does not affect "the court's jurisdiction or authority in contempt proceedings for enforcement of injunctions issued under Section 17 for violations occurring subsequent to the issuance of such injunctions" (95 Cong. Rec. 14879).

Thus, the issuance of the injunction does give a very "real substantial benefit" to the enforcement agency, whereas the supposed "burden" or "disadvantage" to the employer consists of subjecting him to the remedy of restitution of unlawfully acquired benefits that may result from repeated violations in the future. If such violations are unintentional, the employer is not subject to criminal or punitive contempt proceedings, and in civil contempt proceedings he is as free to litigate substantial questions of coverage as he would be in an original injunction action. So far as an injunction under this Act is concerned, living under the "pain of contempt citation", as a practical matter, implies no more (except in cases of willful or criminal violation) than that the restitution remedy will be available.

The problem is particularly acute in the construction industry where any particular project is virtually completed before a case can be investigated and litigated to final judgment. The instant case is an apt illustration of how enforcement of the Act can be frustrated, to the substantial advantage of the employer and corresponding disadvantage to employees and complying competitors and the public interest. The trial court (although convinced of the applicability of the Act) denied a preliminary injunction (R. 84), apparently on the ground that respondent Zachry "is a good, solvent company" (R. 31) "fully able to respond to any judgment" (R. 84). By the time of the trial court's final judgment, the project was virtually completed, and the accumulated wage deficiencies estimated by the Government investigator to be in excess of $70,000 (R. 31), and conceded by respondent to be about $50,000 (R. 123), remained unpaid. In these circumstances, the injunction issued by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Department of Labor.

MAY 1959.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 17311

H. B. ZACHRY COMPANY, APPELLANT-APPELLEE

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE-APPELLANT (AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(January 5, 1959)

Before TUTTLE, JONES and WISDOM, Circuit Judges

TUTTLE, *Circuit Judge:* H. B. Zachry Company is a Texas corporation engaged in large construction projects. During its existence it has completed more than 1200 of a value of over $300,000,000. More than $78,000,000 worth of construction work was completed by this company during the three years preceding the trial. These projects include the building of highways, railroads, power lines, dams, and water systems. It was under contract with the Lower Nueces Water Supply District to build a dam for the purpose of providing a water reservoir approximately ten times the size of that previously existing. The District was under contract to furnish water exclusively for the City of Corpus Christi, Texas. The dam, known as

the Mathis Dam, is some 1500 feet downriver from an older dam which would be inundated upon the completion of the new construction.

Industries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce.

Investigation by the Wage and Hour Division of the Department of Labor disclosed, without dispute, that certain construction employees of Zachry Company were not paid in accordance with the minimum wage requirements of the law—that is they were not paid time and a half for overtime beyond forty hours per week, unless the overtime hours occurred on days on which the employees worked more than eight hours, or unless they worked on Sunday. Following this investigation, the Secretary filed suit against Zachry seeking a temporary and permanent injunction against such alleged violation of the Wage and Hour law.

The trial court held a hearing on the motion for preliminary injunction, and although expressing the tentative view that the activities of the construction workers were covered by the Act, it declined to enter a temporary injunction pending a full development of the case on final trial. At the later trial the Court adhered to its view that the workers were covered by the Act, and granted an injunction as to the construction employees on the particular project only, stating when it did so that Zachry's president had estimated the project would be finished in thirty days. It elsewhere appeared in the record that the job was substantially completed.

Zachry Company appealed on the ground that the

construction workers on this project were not covered by the applicable section of the Wage and Hour Law.[1]

The Secretary of Labor filed a cross appeal contending that the trial court erred in not granting a general injunction against Zachry prohibiting violation of the terms of the Act as to all future activities of the company.

The Secretary concedes that the construction workers were not engaged "in commerce." If, therefore, his views are to prevail it must be on the basis of their being engaged "in the production of goods for commerce." Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed "in [a] closely related process or occupation directly essential to the production" of goods.

Although this is a much litigated field, we find no decision of the Supreme Court, and only one Circuit

---

[1] 29 U.S.C.A. 207(a) provides as follows:

"Except as otherwise provided in this section, no employer shall employ any of his employees who engaged in commerce, or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

29 U.S.C.A. 203(j) reads:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Court opinion in which this definition is sought to be applied to a state of facts closely similar to those here presented.[2] There are certain general pronouncements of the Supreme Court, however, which serve as guideposts to us in our attempt to apply this statute. The first of these is that this statute should be given a liberal construction, *Mitchell* v. *Vollmer,* 349 U.S. 427, 429. The second is that the scope of the Act is not co-extensive with the power of Congress over commerce. *Kirchbaum* v. *Walling,* 316 U.S. 517. As stated in *10 East 40th Street Building, Inc.* v. *Callus,* 325 U.S. 578, "in enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce." A further general principle is that which requires courts to undertake, if possible, to understand the purpose sought by Congress in adopting an amendment to a statute which has already been the subject of much judicial construction.

As to the first general principle above enunciated, we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress. We think that this Court has consistently followed the rule of liberal construction. Recent decisions of this Court, we think, evidence its purpose to apply the language of the statute liberally in areas of doubt. In discharging what the Supreme Court in *10 East*

[2] It is to be noted that this definition was changed by an amendment to the statute in 1949. Prior to that amendment the relevant part of the definition was that an employee should be deemed engaged in the production of goods if such employee was employed "in [a] process or occupation necessary to the production" of goods.

40th Street Building, Inc. v. *Callus, supra,* calls its "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations," this Court has held subject to the Act, because engaged in commerce, employees of a contractor engaged in building a new building for a radio broadcasting station, *Mitchell* v. *Hodges Contracting Co.,* 238 F. 2d 380, employees engaged in the construction of a field plant for production of materials essential to the construction of a causeway to become a link in an interstate highway system, *Archer* v. *Brown & Root, Inc.,* 241 F. 2d 663, and employees engaged in the construction of bulk jet fuel storage tanks and fueling systems at an airport for the United States Air Force, *Mitchell* v. *Empire Gas Engineering Co.,* 256 F. 2d 781, in which this Court stated "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

Regarding the second general principle, we think it plain both from the legislative history and the many court decisions emphasizing the fact, that not every activity that in any way affects commerce, and not every activity that in some way leads ultimately to the production of goods for commerce, is intended to be included within the terms of the statute. The law as it stood before the 1949 amendment was itself somewhat restricted, in that an employee, to come within the act, must be employed in a process *necessary* to the production of goods to have a covered status. As stated by the Supreme Court in 10 East 40th Street Building, Inc., *supra:*

> The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters.

> Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 323 U.S. 134. In giving a fair application to § 3(j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority". *Kirschbaum Co.* v. *Walling, supra,* at 525. For as was pointed out in *Walling* v. *Jacksonville Paper Co., supra,* at 570, we cannot "be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.

In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word "necessary." to the term "directly essential," and by adding also the words "closely related" to modify the word "occupation." Reference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was

to add to rather than detract from the class of employees to be considered engaged in local enterprises.

Obviously, an occupation might be necessary to the production of goods for commerce which is not closely related to production, and which even if closely related is not directly essential to production. Undoubtedly the employees who haul concrete to the dam site; those who clear the site; those who build the frames for the work and who actually pour the concrete or grade the earthen dam, are links in the "long chain of causation which brings about so complicated a result as finished goods."

The courts have consistently held, however, that those engaged in building a plant to be used for the manufacturing of goods do not even come within the more liberal requirement of the old statutory definition of "necessary to the production of goods." *McDaniel* v. *Brown & Root,* 10 Cir., 172 F. 2d 466. As noted in footnote 4, page 471, of the opinion in that case by the Court of Appeals for the Tenth Circuit:

> The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of the Supreme Court in *Murphy* v. *M. T. Reed, et al.,* 335 U.S. 865, S. Ct. 105. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Advance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities,

were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. The Supreme Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construction work and to reconsider the remaining causes of action in the light of the decisions in the case of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031.

We think this analysis of the Murphy case is correct and that there is thus Supreme Court approval of the many cases of similar import from the Courts of Appeals. See *Reed* v. *Murphy*, 5 Cir., 168 F. 2d 257, affirmed as to construction workers in *Murphy* v. *M. T. Reed, et al, supra; Parham* v. *Austin*, 5 Cir., 158 F. 2d 566; *Noonan* v. *Fruco Construction Co.*, 8 Cir., 140 F. 2d 633; *Kelly* v. *Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555. These cases recognize that the rule they apply is in accord with the Interpretative Bulletin No. 5 of the Wage and Hour Division itself [3] expressing the view that employees engaged in the original construction of buildings ultimately used for production of goods for commerce are not within the scope of the Act. These cases all arose under the earlier definition. Certainly no broader coverage has

[3] Wage and Hour Interpretative Bulletin No. 5, Paragraph 12, Dec. 2, 1938, revised Nov. 1939, reads: "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. * * *"

been intended by the amendment of 1949. Moreover, the construction workers here are at least one more step physically removed from production than are workers building facilities which are to be used for manufacturing or assembling for commerce. Here the end product of the construction work is the dam or, at most, the reservoir. These facilities then impound or contain water, which is then used in the manufacture of goods for commerce. As said in *10 East 40th St.* v. *Callus, supra:* "Remoteness of a particular occupation from the physical processes (of production) is a relevant factor in drawing the line."

Cases which apply the "engaged in commerce" provision of the Act are of course not applicable here. Thus we can derive little guidance in construing the definition section relating to production of goods for commerce from *Allstate Construction Co.* v. *Durkin,* 345 U.S. 13, and *Mitchell* v. *Vollmer,* 349 U.S. 427.

The Court of Appeals for the Tenth Circuit and the Court in the Eighth Circuit in the two Chambers Construction Company cases, *Mitchell* v. *Chambers Construction Co.,* 10 Cir., 214 F. 2d 515, and *Chambers Construction Co.* v. *Mitchell,* 8 Cir., 233 F. 2d 717 expressed the view that construction workers engaged in repairing and enlarging a city's water supply were not engaged in original construction and that the definition of production of goods was broad enough to cover them. The first case did not need to, and did not, decide the issue, because it affirmed the lower court's refusal to grant an injunction, even though the court said "we are inclined to agree" with the Secretary's contentions. In the second case the Court equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra,* with construction of facilities to be used for production of goods. With all deference to the court, it is clear that

it did not support its conclusion by an analysis of the cases clearly recognizing the distinction between these two bases for coverage.

Applying, as we must, the declared intent of Congress to require a showing of something more clearly related to production and something more directly essential to production than had obtained under the earlier law, we cannot consistently hold that this construction work was a covered occupation because one closely related and directly essential to the production of goods for commerce. This would not only amount to a reversal of our earlier decisions, but would also amount to narrowing the class of excepted occupations in the face of a Congressional mandate to broaden it.

We conclude that the record discloses that the occupations here involved were not covered under the Act.

The judgment is reversed for entry of judgment for appellant.

Judgment

Extract From the Minutes of January 5, 1959

No. 17311

H. B. ZACHRY COMPANY

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, (AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for entry of judgment for appellant, H. B. Zachry Company, in accordance with the opinion of this Court.

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No. [redacted] 83

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted]7

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

H. B. ZACHRY COMPANY,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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No. 963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner.

vs.

H. B. ZACHRY COMPANY,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the District Court on the Petition for Preliminary Injunction (R. 78-84) is not reported. The memorandum opinion of the District Court, upon final disposition of the case (R. 131-142,), is reported unofficially at 13 W. H. Cases 881. The opinion of the Court of Appeals is reported at 262 F(2d) 546, and is contained in the Appendix to the Petition.

JURISDICTION

The Petition recites the requisites for jurisdiction.

QUESTION PRESENTED

In general terms, the question in this case is:

> Were the construction workers of Respondent, while working on the dam project, engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

However, under the facts and under the controlling definition contained in the Act, Respondent's employees can be deemed to have been engaged "in the production of goods for commerce" only if they worked in a process or occupation "closely related" and "directly essential" to the actual physical manufacturing of such goods. Hence, as a refinement of the general question stated above, the precise question involved herein is:

> Were the construction workers of Respondent, while working on the dam project, employed in a process or occupation *closely related* and *directly essential* to the actual physical production of goods for commerce?

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.)* are as follows:

"Sec. 3. As used in this Act—

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely related* process or occupation *directly essential* to the production thereof, in any State.

"Sec. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

REGULATION INVOLVED

Part 776, Tit. 29, Labor, c. V, Wage and Hour Division, Department of Labor, Sec. 776.20(b) of the Code of Federal Regulations, as amended (3 CCH L.L.R., par. 24,102.20), provides as follows:

"The Act's definitions do not, however, include as 'goods' such things as *dams*, river improvements, highways and viaducts, or railroad lines."

STATEMENT

This is not an "in commerce" case; rather, it is a "production of goods for commerce" case. It hinges on the activities of Respondent's workers at the new Wesley E. Seale Dam site located on the Nueces River near Mathis, Texas, some 42 miles distant from Corpus Christi, Texas (R. 48). The Nueces River is a local stream situated entirely within the State of Texas (R. 51).

In 1955, as a result of competitive bidding, Respondent was awarded a contract to construct the dam. The owner and contracting party with Respondent was the Lower Nueces River Water Supply District. The District is a "governmental agency, a body politic and corporate, and a municipal corporation," Art. 8280-134(14), Vernon's Annotated Civil Statutes of Texas. It was created by an Act of the Legislature of the State of Texas, Acts 1949, 51st Legislature, c. 159, p. 326, Art. 8380-134, V.A.C.S. (R. 47), which Act has been held constitutional by the Courts of Texas, *Lower Nueces River Water Supply District v. Cartwright*, 274 S.W.(2d) 199 (writ refused, n.r.e.). The District and the City of Corpus Christi "are separate governmental agencies" (R. 48).

Upstream from the Mathis Dam[1] at a distance varying from 1,300 to 1,500 feet there is a smaller dam which has been there for years and which is

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[1] The Wesley E. Seale Dam is commonly known as the "Mathis Dam," and both Petitioner and Respondent have employed the latter name throughout this litigation.

referred to as the "old dam" (R. 44-46). The relative positions of the two dams are depicted in the photograph which is Plaintiff's Exhibit No. 5, and which is before this Court in original form (R. 44). The old dam impounds approximately 34,000 acre feet of water, whereas the new Mathis Dam will impound slightly more than 300,000 acre feet (R. 45). When the reservoir behind the Mathis Dam is filled, the old dam "will be inundated by the new lake," and the old dam will be partially breached (R. 46). The old dam is also owned by the District.

The District has a contract with the City of Corpus Christi whereby the District has agreed to sell to the City all water impounded by the Mathis Dam (R. 41, 45, Pl. Ex. No. 1). Water so sold will travel down the bed of the Nueces River some 26 miles to a treatment plant at Calallen, Texas. After being treated at Calallen, the water will travel an additional 16 miles (for a total journey of 42 miles from the dam) where it will go into the Corpus Christi water distribution system (R. 48). Once the water enters such distribution system, it will be sold by the City to the same general type of customers that are found in any city. Corpus Christi classifies these customers as residential, commercial, seasonal, hospitals, schools, churches, city and industrial (R. 56).

Included among the customers are some industrial plants which manufacture goods for commerce. Direct evidence was introduced as to only one such customer (R. 61); but, to shorten the record, it was agreed that the City of Corpus Christi sells water to various industrial plants located in and near

the City, and that such plants produce goods for interstate commerce (R. 63-64). It was undisputed that water used by these industrial customers does not become a part of the products which they produce for commerce. Rather, in the words of the trial court, such water "is used for cooling towers and engines and so forth" (R. 64).[2]

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[2] At two places in his Petition (pp. 8, 24n), Petitioner contends that the water impounded by the dam will become an "ingredient" of goods moving in interstate commerce, and Petitioner states that he will further develop this point if certiorari is granted. To support his contention, Petitioner cites only a terse collateral remark made by the trial court in its initial order denying the preliminary injunction—which order, of course, is not the final judgment here under review.

Petitioner's "ingredient" claim can best be disposed of by quoting the *only* part of the record in which such matter is even alluded to. The lone witness who testified how water is used by the industrial plants was asked whether it is used in connection with cooling towers and condensation towers. When such question was asked, the following colloquy ensued:

"THE COURT: It [the water] is not part of the product, it is used for cooling towers and so forth.

"COUNSEL FOR RESPONDENT: So far as I know, none of them are part of the product, but—

"THE COURT: So far as I know, none of them are. *Do you know of any that water is a part of their product?*

"THE WITNESS: *No sir.*

"THE COURT: *Any appreciable part of the product?*

"THE WITNESS: *No, sir.*

"COUNSEL FOR PETITIONER: I am sure they try to keep it out of their petroleum products."

With this being the sole evidence pertaining to Petitioner's "ingredient" point, it would appear plain that such point is not in this case. Petitioner himself admits (p. 24n) that the point "has not hitherto been pressed in this case."

Also, Petitioner agreed that the water itself is not sold in interstate commerce either by the City or by its industrial customers (R.64).

Finally, it should again be noted that the industrial customers who produce goods for commerce purchase water from the City, rather than from the District. Such customers have no contractual relationship whatever with the District (R. 66); and they certainly have no contractual relationship with Respondent or its employees.

Respondent was building a dam. Its employees were solely engaged in building such dam. A dam is not "goods" within the meaning of the Fair Labor Standards Act.

The dam will impound water. No one has contended that such water will be "goods" under this Act, or that the water itself will in any way be "produced" for commerce.

Rather, the only "goods" involved in this case are the various products which are manufactured for interstate commerce by the industrial plants located in or near Corpus Christi and which have water used in the process by which they are produced—water purchased by the industrial plants from the City of Corpus Christi, with the City in turn purchasing such water from the District; with the Distrist acquiring and being able to sell such water only by virtue of the fact that it employed Respondent to build the Mathis Dam; with Respondent having built the Dam by using its employees; and

with such employees, their activities, and the wages paid to them by Respondent, being the subjects of this suit.

As provided in its contract with the District, Respondent paid its employees time and one-half for all hours worked in excess of eight each day, and for all hours worked on Sundays and holidays, but Respondent did not pay overtime based on a forty-hour work week as called for by the Fair Labor Standards Act. Respondent used the wage formula called for by its contract with the District, rather than the formula required by the Act, because its legal staff had advised it that the Act did not cover the Mathis Dam project (R.124).[3]

[3] Economists can well debate whether the "overtime after 8 hours per day" formula used on this job by Respondent or the "overtime after 40 hours per week" required by the Act is, in the long run, more beneficial to employees. Certainly, in many cases—especially in the construction industry where the work week often is shortened by weather conditions—the formula used on this job by Respondent provides overtime pay for employees when that prescribed by the Act does not. Contrariwise, in some instances the Act's formula provides for overtime when the "overtime after 8 hours per day" formula does not. In any event, this is not a case in which the employer blithely disregarded the matter of overtime. Rather, Respondent paid overtime on Sundays and holidays exactly the same as it would have paid if it had thought the Act applied. Since it did not think that the job was covered, Respondent followed the terms of its contract with the District; and, on weekdays, paid time and one-half for overtime, but did so for pay periods in excess of 8 hours per day, rather than in excess of 40 hours per week. Hence, on the matter of overtime pay, Respondent's employees were not exactly being ground under the heel of their employer. For an exposition of the mathematics of this matter, see pages 6-9 of Respondent's brief in the Court of Appeals.

If a construction job is unique—if its relationship to commerce is such that it does not fit into a pattern of prior work—Respondent always asks its legal staff to review the situation and to advise it whether the Act is applicable (R.120-121). That procedure was followed on the Mathis Dam project. The legal staff first gave an oral opinion that the project was not covered, but then, to be doubly sure, Respondent asked its legal department to review the matter and to issue a written opinion. The written opinion also was to the effect that the job was not covered (R 124-125).[4]

The trial court held that Respondent's construction workers were engaged "in the production of goods for commerce" and were, therefore, covered by the Act. Accordingly, that court granted the in-

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[4] Neither Respondent nor its legal staff treats lightly the matter of coverage under the Act. On the contrary, in a vast majority of cases both have agreed that Respondent's employees are covered. Figures for the period immediately prior to trial are as follows (R. 109-116).

Year	Total Jobs	Value	Under The Act	Not Under The Act	Percentage Under The Act
1956	78	$34,352,000	74	4	94.9%
1957	74	$20,000,000	73	1	98.6%
1958 (to trial)	33	$23,907,000	31	2	93.1%
Total	185	$77,449,000	178	7	96.2%

Thus, the Mathis Dam job does not fit into any pattern of non-compliance, or of refusal to recognize coverage. Rather, it is merely one of the very few—3.8% of the total, or 7 out of 185—in which Respondent and its legal staff have not concluded that coverage exists.

junction prayed for, except that the injunction was limited in scope to the performance of the Mathis Dam contract (R. 142, 143-144).

The Court of Appeals for the Fifth Circuit reversed the coverage ruling and held that the employees at the Dam were not covered by the Act, 262 F (2d) 546.

ARGUMENT

This case is *sui generis*. Its singular facts gave rise to the decision of the Court of Appeals, and such decision clearly is correct. No important question of federal law is involved, and Petitioner's footnote citations of government publications and of a gazetteer do not transmute the case into one of earthshaking proportions. The asserted conflict of decisions is a sham.

I.

The Uniqueness Of The Facts

Petitioner's statement of the case is arrantly adroit. Stressed are the obvious facts that water presents a problem of national scope; that Respondent handles large projects in several states; and that Corpus Christi makes significant contributions to the Nation's economy. Suppressed or subordinated are most of the facts demonstrating the local nature of Respondent's construction of the Mathis Dam. Utterly lacking is any proof of the nature of the

employees' activities in constructing such dam.[5] So dense is the interstate aura created by Petitioner that one must emerge from the Petition and seize upon the record for even a breath of intrastate air, as well as for illumination.

As is said above, this is not an "in commerce" case. Rather, it is wholly a "production of goods for commerce" case. Petitioner has framed both his pleadings (R. 6-7) and his Petition (p. 2) upon the "production of goods for commerce" portions of the Act, and the case was tried upon such theory. The trial court held that only such portions of the Act are involved (R. 137), and the Court of Appeals rightly said:

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute,

[5] Petitioner offered not one whit of evidence to establish the nature of the activities of Respondent's employees, and such failure was assigned by Respondent as error in its Brief in the Court of Appeals (pp. 14, 17-21). The rationale of the decision of that Court made unnecessary a discussion of this point in the Court's opinion. The point is, however, both sound and important, and it affords an independent basis for upholding the reversal of the judgment of the trial court. For the convenience of this Court, a summary of the authorities dealing with such failure of proof is contained in Appendix "A" hereto, pp. 23, infra.

> 203(j), to the effect that the construction workers are employed 'in [a] *closely related* process or occupation *directly essential* to the production' of goods."

In *10 East 40th Street Building, Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1227, this Court observed that it has the:

> "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations."

Certainly, in the case at bar, there is a most complicated and unique industry situation which has called for the making of such an *ad hoc* determination by the Court of Appeals—a situation so unique and so complicated that the goods ultimately entering into commerce are far distant from the activities of Respondent's employees as a matter of physical causation, as a matter of contractual connections, and also as a matter of geography.

Geography doubtless is least important, but even measured by it, the water impounded by Mathis Dam travels 26 miles down the bed of the Nueces River to the water purification plant at Calallen, where its journey is interrupted for treatment; it travels an additional 16 miles before it enters the distribution system of Corpus Christi; and it then follows the ramifications of that system for an undetermined distance before it happens to become a collateral factor in the production of nylon, chemicals, or petroleum products which are shipped in interstate commerce.

The contractual connection between Respondent's employees and the goods ultimately destined for commerce is even more remote. Apart from the contracts between Respondent and its employees, there first exists the contract between Respondent and the District for the construction of the Dam; there follows the contract between the District and the City of Corpus Christi for the sale of the water; there then ensues the contractual relationship between the City and its industrial customers for a further sale of the water; and there finally exist unknown contracts which provide for the industrial production of goods for commerce and which involve the use of water as an incident thereof.

Finally, as a matter of cause and effect, causation exists in this case only in the sense that it exists in a Rube Goldberg contraption. Whatever activities each of Respondent's employees performs ultimately leads to the existence of Mathis Dam; the existence of the Dam causes water to be impounded in a reservoir behind it; the accumulation of water makes possible the creation and existence of the purification plant at Calallen; that plant makes water suitable and available for use by residents of the City of Corpus Christi; the suitability and availability of the water result in its use by industrial plants; and, eventually, someone working in such a plant takes a drink of the water or puts it into a boiler or cooling tower in connection with the production of goods some of which ultimately find their way into interstate commerce.

If, as this Court recognizes, questions of the type involved in this case require *ad hoc* factual determinations of coverage under this Act, can it possibly be thought that the facts herein will again arise for decision in the foreseeable future? Contrariwise, is not this case bottomed upon its own peculiar facts, and is it not best than nothing be said or done herein which might interfere with similar just and equitable *ad hoc* decisions under whatever individual facts might be presented in future cases?

II.

The Correctness Of The Decision Below

With the decision in this case necessarily turning upon whether the activities of Respondent's employees were "closely related" or "directly essential" to the production of goods some 42 miles and three or more contractual connections distant, the decision of the Court of Appeals that no such close and direct relationship existed was clearly correct. To repeat an expression used above, in a remote Rube Goldbergish sense there exists in this case a causal connection between an employee of Respondent who scooped dirt or mixed cement on the Mathis Dam, and the nylon, chemicals or petroleum products which emerged at plants in or near Corpus Christi. However, as this Court said in the *Callus* case, supra;

> "merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not

bring it within the scope of the Fair Labor Standards Act."

As spelled out in the Fair Labor Standards Act, the terms "closely related" and "directly essential" must mean something in the chain of causation. Whatever they mean must be much more narrow than the test of being "*necessary* to the production" of goods for commerce, which test was employed in the Act prior to 1949. As the Court of Appeals recognized, the change in the language of the Act which was made in 1949—the elimination of the "necessary" test and the substitution of the "closely related" and "directly essential" requirements—obviously meant something. If the language of the change does not explain itself, the legislative history thereof leaves no doubt but that the change was intended to narrow the scope of the Act, and to remove therefrom local activities not intimately related to the actual production of goods. As the Department of Labor itself said in its administrative regulations interpreting the Act, Sections 776.0 to 776.30 of the Code of Federal Regulations (3 CCH L. L. R., par. 24,102.17):

> "'The legislative history shows that the new language in the final clause of Section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on 'goods for commerce') whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. *Some employees whose work*

> *might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production...*
>
> "...
>
> "*No precise line of inclusion or exclusion may be drawn;* there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions by the courts."

Even under the "necessary" test which existed under the pre-1949 language of the Act, this Court observed, again in the *Callus* case, that:

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. *But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line.*"

If remoteness was a relevant factor in drawing the line even under the pre-1949 wording of the Act, then it is even more a factor under the "closely related" and "directly essential" requirements of the present Act. As the Labor Department itself recognizes "no precise line of exclusion or inclusion may be drawn." However, if the facts of the instant case do not reveal prohibited remoteness, then what possibly can constitute remoteness, and under what conceivable state of causal facts could it ever exist?

III.

The Lack of Any Important Federal Question

Certainly, the facts of this particular case raise no important federal question. To such facts, the Court of Appeals applied the "closely related" and "directly essential" tests. Far from borning any important federal question, the Court's application of these tests was dictated and required by the positive language of the Act. By making an "*ad hoc* determination"—by following the Labor Department's own recognition that "no precise line of inclusion or exclusion may be drawn"—that Court concluded that the building of Mathis Dam is too remote from the production of goods for commerce to be covered by the Act. This obvious conclusion led to the holding herein, and such holding is not exactly one which will shake either the economy or the jurisprudence of the Nation.

In an endeavor to prove that somehow, in someway, the decision below has an importance over and beyond the facts of this particular case, Petitioner adverts to this Court's decision in *Mitchell v. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860, and Petitioner argues that the Court of Appeals is attempting to sabotage that decision. In particular, Petitioner points to the ruling in the *Vollmer* case to the effect that coverage under the Act is to be:

> "determined by practical considerations, not by technical conceptions,"

and Petitioner avers that the Court for the Fifth Circuit is ignoring such principle.

Far from ignoring this salutary principle, the Court of Appeals has recognized and applied it in this case, citing, *inter alia*, *Mitchell v. Empire Gas Engineering Co.*, 256 F(2d) 781, wherein the Court echoed this Court's words in the *Vollmer* case to the effect that:

> "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

What the Court of Appeals did herein was to determine this case "by practical considerations"—by the tests of "closely related" and "directly essential." The decision in the case resulted solely from the application of such tests.

Petitioner would have this Court believe that the Court of Appeals tied itself to some sort of rule that "new construction" necessarily is outside the scope of the Act. Prior to this Court's decision in the *Vollmer* case, supra, many persons doubtless believed that "new construction"—as opposed to "repair or reconstruction"—was so immune. The decision in *Vollmer* dispelled any such belief, and Respondent has not argued any doctrine of "new construction" herein. Neither was the Court of Appeals so naive as to rely upon, or revert to, any holding that "new construction," simply because it is new, is exempt

from the Act. Rather, the Court merely correctly perceived and held that the nature of a particular construction project—be it "new construction" or otherwise—is a most relevant factor to be considered in determining whether such project is or is not "closely related" and "directly essential" to the production of goods for commerce.

Likewise, of course, in noting that this Court's decision in the *Vollmer* case was made in an "in commerce" case, rather than in a "production of goods for commerce" case, and in recognizing that the tests of "closely related" and "directly essential" are, by the terms of the Act, made particularly applicable to the latter type of case, the Court of Appeals once again only followed patent principles, rather than making any novel pronouncement of law. Indeed, in the regulation quoted above on page 15, the Department of Labor itself recognized that the "closely related" and "directly essential" tests apply, not to "in commerce" cases and not to cases of work on the "actual production" of goods for commerce, but rather to situations such as the one at bar in which it is asserted that employees are engaged in something less than commerce itself, and something less even than actual production of goods for commerce, to-wit, in some activity which by statutory definition must be closely related and directly essential to the final production of goods which enter the stream of commerce. It ill becomes the Secretary of Labor to assert in this Court that the following of his own regulations creates an important question of federal law, and is erroneous.

IV.

The Asserted Conflict of Decisions

When the normal time for applying for a writ of certiorari herein was on the verge of expiring, and when Petitioner secured an *ex parte* extension of time, Respondent believed that the Solicitor General —in his position of knowing what is happening in the federal courts around the country—must have known of some new development (some pending or prospective lawsuit) which might affect the decision in this case, and which might possibly create a conflict of decisions.

Now, however, it is obvious that there is no such new development. Nothing new in the law pertaining to this case has arisen in recent months, or even in recent years.

In lieu of raising any new development, Petitioner merely warms over old porridge by asserting a conflict between the decision herein and the decisions in *Mitchell v. Chambers Construction Company*, 214 F(2d) 515 (decided in 1954) and *Chambers Construction Company v. Mitchell*, 233 F(2d) 717 (decided in 1956). The Court of Appeals correctly analyzed both of those cases.

In the first case, by the Eighth Circuit, the question here in issue was not decided, and, while affirming the refusal to grant an injunction, the Court merely said that it was "inclined to agree' with the Secretary's contentions.

In the second case, as stated by the Court of Appeals herein, the Court for the Tenth Circuit "equated the new construction conception as to instrumentalities of commerce, *Vollmer v. Mitchell*, supra, with construction of facilities to be used for production of goods," without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities.

Morever, the facts in the two *Chambers* cases are clearly distinguishable from those at bar since both involved construction work done on *water distribution systems*, rather than on facilities which resulted in the impounding of water that ultimately reached the distribution system. As a result the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of Corpus Christi.

A metaphor applied in the first of the *Chambers* cases can well be applied here, to-wit:

> "The question in each case is governed by the facts. Somewhere between the black and white are factual shades of gray, and adjudicated cases serve only to add to the catalogue of colors from which we choose a shade to match our own."

If any doubt exists as to the proper coloration for this case, the Court of Appeals has assigned it

a proper hue in view of its individual facts and the commonplace question of law which it presents.[4]

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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[4] In the final subdivision of his Petition (pp. 27-28), Petitioner requests that this Court not only reverse the Court of Appeals on the matter of coverage, but that it also reverse the action of the trial court wherein the latter court granted Petitioner injunctive relief but limited the injunction to the Mathis Dam project. Respondent finds it difficult to believe that this Court would so reverse the trial court on a matter so peculiarly within its discretion. However, since Petitioner has seen fit to raise this matter of discretion—and especially since he has seen fit to inveigh against the Fifth Circuit for its general standards "warranting denial of injunctive relief," which standards, Petitioner says, "exceed, we believe, the bounds of legal discretion" (p. 27), Respondent is including herein, in Appendix "B", p. 27, matters bearing upon the proper scope of the injunction, if any injunction at all should be deemed justified.

APPENDIX "A"

The Failure of Petitioner To Prove The Nature Of The Employees' Work

As is said above (p. 11 n. 5), Petitioner did not prove the specific nature of any task performed by any employee of Respondent on the Mathis Dam project. The evidence shows that there were more than 300 employees on this job, but Petitioner did not call a single one as a witness; he did not take a single deposition of any employee; and he made no request for admission as to their activities.

Since dams do not build themselves, it is of course an obvious conclusion that Respondent's employees worked at building Mathis Dam. However, as appears from the decisions of this Court which are cited below, the question is not "What was the employer doing?" but rather is "What was the particular employee doing?"

Generally speaking, Respondent's employees were building the Mathis Dam. If any or all of them were under the Fair Labor Standards Act, they necessarily were embraced by the Act because their activities can be deemed "closely related" and "directly essential" to the production of goods for commerce.

If the Government asserts that John Doe, or an unspecified number of John Does, working for Respondent on the Mathis Dam, were entitled to overtime pay because they were under this Act, it must prove that the activities of such persons met

the "closely related" and "directly essential" tests. This, the Government did not even attempt to do.

Perhaps there might be a talented John Doe who was so skilled that his activities were an absolute *sine qua non* to the construction of the Dam. On the other hand, there most certainly were employees who did nothing except feed hay to mules, or pour gasoline into tractors, which furnished a means of locomotion for the scooping of dirt or the quarrying of rock used on the Dam. Without proof of specific activities, can such persons be equated as far as coverage under the Act is concerned? Without proof of what each does, can it blindly be said that the tests of "closely related" and "directly essential" lead to the same results with respect to all employees, or is it not true that the activities of one employee might fall within or without such tests, while application of the tests to the activities of other employees might lead to an entirely different conclusion? If, as is plain from the language of the Act, these tests must be applied to the *particular* activities of *particular* employees, then how can the tests be applied, or the results thereof be judicially declared if, as in the case at bar, the activities are wholly unproved and unknown?

In one of the early cases interpreting the Act, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S. Ct. 1116, this Court said:

> "the provisions of the Act expressly make its application dependent upon the character of the employees' activities."

Soon thereafter, in *McLeod v. Threlked*, 319 U.S. 491, 63 S. Ct. 1248, the Court reiterated that:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. *It is the work of the employee that is decisive.*"

Again, in *Overstreet v. North Shore Corporation*, 318 U.S. 125, 63 S. Ct. 595, the Court reiterated:

> "The nature of the employer's business is not determinative, because as we have repeatedly said, *the application of the Act depends upon the character of the employees' activities.*"

Within this very year, this Court has again endorsed the holding on this point in *Kirschbaum v. Walling* and has said in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. 260, cited by the Government in its Petition herein:

> "To determine the answer to this question [of coverage under the Act] *we focus on the activities of the employees and not on the business of the employer.*"

If, then, the application of the Act "depends upon the character of the employees' activities," how can it possibly be known whether the Act applies until someone proves the nature of the employees' activities which are involved? As the opinion of this Court clearly shows, specific proof of the activities of the particular employees was either made or had by stipulation in *Mitchell v. Lublin*, supra. Without

such proof—and no such proof was had or even attempted in the case at bar—the applicability of the Act to the employees involved in the instant case simply can't be determined.

Since the Petitioner Secretary of Labor brought this suit, he necessarily had the burden of proof therein. Having brought the suit in his official capacity as Secretary of Labor, Petitioner was indeed a "formidable opponent," *(Archer v. Brown Root, Inc.*, 241 F(2d) 663), but once in court he is:

> "in no different position than any ordinary litigant and is, therefore, bound by the same rules of civil procedure in the same prospects as an ordinary litigant." *Mitchell v. Bass*, 252 F. (2d) 513.

Certainly when specific legal standards—"closely related" and "directly essential"—are established as the judicial tests which the courts are to apply to the facts before them, and when the only factual grist which the courts can thus consider is evidence of the particular duties of particular employees, an "ordinary litigant" would indeed be required to show to the courts the duties of such employees.

No lesser burden of proof is accorded the Petitioner Secretary of Labor. Certainly he should not be permitted to go into court and obtain an injunction, with its attending possible criminal penalties, unless in so placing an employer in such a perilous position he at least meets the standards of proof which would be required from any ordinary litigant.

Absent a showing of the activities of the employees who he claims are entitled to overtime pay in this case, Petitioner simply hasn't established that the Act is applicable.

If one of the "John Does" involved in the case sued Respondent under the Act to recover double overtime pay, attorney's fees and costs, he most certainly would have to prove the nature of his activities before he could even invoke the Act. Petitioner Secretary of Labor cannot obtain the injunctive relief sought herein with any less *quantum* of proof.

APPENDIX "B"

The Discretionary Nature Of The Injunctive Relief Sought Herein

In this case, the trial court found coverage, but, in the exercise of the discretion which it plainly possesses, limited the injunction that it granted to the Mathis Dam project, rather than granting a blanket injunction pertaining to all of Respondent's activities.

In the Court of Appeals, Petitioner Secretary of Labor filed a cross-appeal complaining of the scope of the injunction. Since that Court held that no coverage existed, Petitioner's cross-appeal never came to decision.

However, in this Court Petitioner also is contending that, if coverage is found to exist, this Court

should override the discretion vested in the trial court and grant a blanket injunction. Again, this Court's recent decision in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. 260, is pertinent for, even though the Court there held that coverage existed (contrary to the holdings in both courts below), the Court said that, upon its reversal and remand:

> *"it will still be within the discretion of the District Court whether or not to issue an injunction."*

citing *Mitchell v. Bland*, 241 F(2d) 808, wherein the Court held that the trial court:

> "would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles."

Prior to this latter decision, the Court which decided it had had before it in *Mitchell v. Hodges Contracting Company*, 238 F(2d) 380, a situation in which a construction company had completed over 1,100 jobs, with payrolls in excess of $300,000. Out of those 1,100 jobs, the Wage and Hour Division had questioned only five. The trial court found that coverage existed in three of the five jobs, but denied the injunction. In affirming such denial, the Court of Appeals reviewed established principles pertaining to the discretion of the trial courts in matters of this kind, and then said:

> "There was, first, the acknowledged fact that, as a general contractor doing miscellaneous construction work, coverage for this employer was a shifting thing dependent upon the nature of the jobs being performed."

Certainly, that is true in the case at bar. Respondent is a general contractor doing many different types of jobs throughout the Nation.

The Court next said:

> "Despite a lengthy investigation, analysis revealed that in the two-year period and out of over 1,100 contract jobs, only five were questioned. Out of payrolls totaling in excess of $300,000 for this period, only small amounts of disputed overtime were involved."

Let us see how the facts in the instant case compare. Respondent has done approximately 1,200 construction jobs of varying kinds, with varying problems of coverage (R. 118). The value of these jobs has been "in excess of three hundred million dollars" (R. 118).

Despite this volume of work and the varying problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 118).

At no time has Respondent ever been sued by an employee for any alleged violation of the Act (R. 119). As is shown above (p. 9, n. 4), during the three years immediately prior to the trial hereof, Respondent had a total of 185 jobs, and it concluded that 178 of them, or 96.2% of the total, were covered by the Act.

Most certainly, these facts do not reveal that Respondent is an habitual violator of the Act, or that it flaunts the Act or intentionally violates it. Under such circumstances, the trial court could well have denied any injunction at all, but, in the exercise of its discretion, it saw fit to grant a limited injunction. Clearly it had this discretionary power, and, under the principles announced by decisions of this Court, the exercise of such power should not be distributed by any decision herein.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*

v.

H. B. ZACHRY COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

This reply memorandum is submitted by petitioner (1) primarily to call attention to another recent lower court decision—handed down subsequent to the filing of the petition—which confirms the need for review by this Court of the Fifth Circuit's decision in the instant case, and (2) to correct respondent's mistaken statement that the record in this case lacks "any proof of the nature of the employees' activities" upon which determination of the coverage issue depends (Br. in Opp., pp. 10-11, 23-27).

1. The District Court for the Northern District of Illinois in *Mitchell* v. *S. A. Healy Co.* (June 23, 1959, 14 WH Cases 262, not officially reported, printed in the Appendix, *infra*, pp. 5-17) held that the Fair Labor Standards Act was applicable to employees working on the construction of a new tunnel which, when completed, would be connected with the Chicago waterworks system and would increase the capacity of that

system to supply water to consumers, among whom were interstate instrumentalities and manufacturers engaged in the production of goods for interstate commerce. After noting the conflict between the decision of the Fifth Circuit in the instant case and the decisions of the Eighth and Tenth Circuits in the two *Chambers* cases (see the Petition for Certiorari, pp. 9-14),[1] the court reviewed the pertinent decisions of this Court and concluded that the *Chambers* decisions accorded with the principles established by this Court's decisions, and that "the *Zachry* decision does not represent the weight of authority" and, further, that this conclusion "is substantiated by the Senate Conferees Report" on the 1949 Amendments to the Fair Labor Standards Act (*infra*, App., p. 15).

The *Healy* decision is now pending in the Seventh Circuit on appeal, and, we submit, confirms the importance of the issue and the present need for its definitive determination by this Court.[2]

2. Respondent's repeated assertion that the record lacks the necessary evidence of the character of the employees' activities (also asserted in both courts below) seems inexplicable in view of the clear and unambiguous admissions of respondent's counsel at the trial. As the District Court pointed out in rejecting this contention (R. 139), it was stated by Government

[1] *Chambers Const. Co.* v. *Mitchell*, 233 F.2d 717 (C.A. 8); *Mitchell* v. *Chambers Const. Co.*, 214 F. 2d 515 (C.A. 10).

[2] As pointed out in the Petition, page 25, the important wage recovery remedy provided by Section 16(c) is not available in "any case involving an issue of law which has not been settled finally by the courts * * *." Thus, numerous construction employees are being deprived of this remedy as long as the conflict and unsettling effect caused by the *Zachry* decision remains unresolved.

counsel at the outset of the trial that "the actual construction workers only were involved," and, when "[d]efendant's counsel expressed satisfaction with this statement," the case was "tried on the theory that those engaged in actual construction work only were involved" (R. 139-140). There was no misunderstanding about this at the trial (R. 28-29),[3] and respondent's counsel expressly conceded that the Government's designation of "all of the construction workers" was "sufficient to satisfy the requirements that we asked for" [*i.e.*, in the request for particulars] (R. 35-36). Respondent's post-trial contention that more particularization was required is wholly insubstantial. Whether the construction employees were masons, carpenters, or laborers, is obviously of no significance to determination of the question here presented.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

HAROLD C. NYSTROM,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JACOB I. KARRO,
Attorney,
Department of Labor.

SEPTEMBER 1959.

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[3] Government counsel conceded that "there were a number of employees who were paid properly in the office, some of the others, we have no quarrel with what he [Zachry] did with them. Our difference arises from the construction employees * * *." (R. 29).

APPENDIX

MITCHELL v. S. A. HEALY COMPANY

U. S. District Court for the
Northern District of Illinois

No. 57C1799, June 23, 1959

(14 WH Cases 262)

ROBSON, District Judge:—The United States of America seeks to enjoin defendant from paying less than the statutory overtime wages to its employees[1] for hours over forty in a work week, pursuant to the requirements of the Federal Fair Labor Standards Act (29 U.S.C. Secs. 201 et seq.). The defendant is a general contractor engaged in the construction of a new tunnel, which is to be a part of the Chicago Waterworks System. The parties have stipulated the facts and the cause is submitted for decision on briefs. The Court hereby adopts the stipulation of facts as its special findings of fact required by Rule 52(a) of the Federal Rules of Civil Procedure.

The stipulation of facts reveals that the 79th Street tunnel, which defendant by contract of July 8, 1956, undertook to construct for the sum of $7,852,050, is to be 4.6 miles in length; that it is to be a 16-foot tunnel to extend from the filter plant reservoir in Lake Michigan at 79th Street in Chicago to connections with the existing State Street and Stewart Avenue tunnels; that the tunnel is being constructed to provide greater amounts of water for the City's increased population and for industrial use, the industrial use being 30% of the daily average pumpage; that the defendant's employees worked on the tunnel from July 16, 1956, and will continue to work on it until at least December, 1959.

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[1] The employees include laborers, watchmen, carpenters, crane operators, mucker operators, compressor operators, mining machine operators, shovel operators, dinky operators, hoist operators, janitors, timekeepers and clerks.

The complaint is predicated on the allegation that

> "A substantial portion of the water supplied by the * * * water supply systems of the city of Chicago, has been and is being sold to and used by instrumentalities of interstate commerce, to facilitate such commerce, and has been and is being sold to and used by persons and firms engaged in the production of goods for interstate commerce, to facilitate such production of goods for interstate commerce."

The defendant's answer denies that its employees are engaged in commerce or in the production of goods for commerce, and accordingly contends the Act is inapplicable to its activities, which, on the contrary are alleged to be "limited wholly to the construction of new and distinct tunnels and shafts incident to a filtration plant."

The Fair Labor Standards Act prescribes rates of pay applicable to

> "* * * employees * * * engaged in commerce or in the production of goods for commerce. * * *" (29 U.S.C. Sec. 260)

It defines "commerce" to mean

> "* * * trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." (Sec. 203(b))

It defines "produced" thus:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining,

handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." (Sec. 203(j))

The wording of this last quoted provision was changed in 1949 by adding the words "closely related" and substituting the words "directly essential" for the word "necessary."

The Government quotes from the Report of the Majority of Senate Conferees at 95 Cong. Rec. 14875, indicative of Congressional intent, thus:

> "* * * employees repairing, maintaining, improving or *enlarging* the buildings, equipment, or facilities of producers of goods are within the coverage of the Act whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer." (Emphasis ours.)

The Department of Labor has issued an Interpretative Bulletin, Subpart B, Part 776,[2] concerning the

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[2] Sec. 776.23. "(a) * * * it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in interstate commerce or in the production of goods for such commerce. * * *

"(c) All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, *enlargement or extension of a covered facility.*"

Sec. 776.26. "Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce. * * * Coverage of any construction work, whether new or repair work, depends upon how closely integrated

Construction Industry, which specifically states the principles concerning the coverage of the Act.

The stipulation of facts further reveals that the Chicago Water System is composed of 61 miles of water tunnels and 4,000 miles of water mains; that it has three districts: the North, Central and South, each with its own system of water cribs; that the Chicago area is 36 miles from north to south and 16 miles from east to west; that this water system serves not

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it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is 'new construction' nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that *the construction project itself need not be actually employed in commerce or in the production of goods for commerce* during the time of its construction in order to be covered. Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive."

Sec. 776.27. "(a)(1) Covered production facilities within the concept of the act include mines * * * electric power and *water plants.* * * *

"(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce. The act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, *enlargement,* reconstruction, *extension* or other improvement of the premises * * * and other equipment. * * * Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. * * *

"(b) The act applies to employees of public utilities which furnish * * * water to firms engaged * * * in manufacturing, processing, producing or mining goods for commerce. *Construction work performed upon the plant and facilities of such a utility is covered as in the case of any other covered production establishment.* The extension of the lines or other facilities of a covered utility for the first time to the premises of an establishment which produces goods for commerce would be subject to the act, because such extension is simply an improvement or *enlargement* of an existing covered utility." (Emphasis ours)

only Chicago, but 58 suburban communities and ten other consumers outside Chicago; that there are six cribs and one direct water intake at the South District filtration plant; that the water tunnels are dug through solid rock, 150 to 250 feet below the ground, and are conduits for "raw" water from the cribs and the filtration plant to the pumping stations, which in turn distribute the water through mains to the approximately half million consumer outlets and 44,000 fire hydrants; that the total average daily amount of water pumped in 1957 was 1,022,055,000 gallons, of which the South Water District pumped an average of 342,400,000 gallons daily to the 68th Street, Roseland and Western Avenue Pumping Stations; that 18% of the daily average pumpage of the Roseland and Western Avenue Pumping Stations supplies 38 companies, including packing houses, airplane engine manufacturers, automotive plants, farm equipment companies, beverage manufacturers, bakeries, surgical houses, machinery companies and railroads; that the 16-foot tunnel which defendant is building is horseshoe shaped and lined with concrete, and has 10-foot tunnel connections and accompanying shafts; that defendant employs about 205 employees in the work, and it is admitted that the employees work longer than a 40-hour week without overtime pay.

The stipulation of facts states in great detail the numerous and varied industrial firms served by the Chicago Water System. There can be no question that water is an essential part of the functioning of these companies in the production of goods for commerce, and to the instrumentalities engaged in commerce. The amount of water so consumed is very substantial although probably not the chief use of the water supplied by the Chicago system.

The abundance of litigation on the coverage of the Fair Labor Standards Act overtime pay provision demonstrates the difficulty of defining its precise limits. On an initial reading of the statute (subd. 203(j)) it

seems clear and understandable, as are the several principles enunciated by all precedent. But the end result of the decisions, with a few exceptions, would refute this seemingly clear meaning.

The 1949 amendment, above noted, to that subsection, would corroborate a finding of Congressional intent to narrow further the scope of auxiliary occupations to be covered by the Act. The Court of Appeals for this Circuit so construed the effect of the amendment in Huke v. The Ancilla Domini Sisters, No. 12560, decided May 26, 1959, 14 WH Cases 162.

There had grown up in the cases a demarcation (which seems to have lost caste since the Supreme Court case of Mitchell v. C. W. Vollmer & Co., Inc., 349 U.S. 427, 12 WH Cases 522) between employments covered and those not covered, depending upon whether the work was "new" construction or simply enlargement, repairs, or maintenance. "New" construction was not covered. This distinction was evolved generally in cases involving transportation, or the "engaged in commerce" clause of the section under consideration, rather than the clause involving "production of goods for commerce," here under consideration, although it has infrequently been applied in these cases as well. The very recent and extremely pertinent decision of the Fifth Circuit Court of Appeals in H. B. Zachry Company v. Mitchell, 262 F.2d 546, 14 WH Cases 17 (1959), rejects the two relevant Chambers' cases[3] on the ground that the courts there failed to differentiate between these two bases of the Act's coverage. It is clearly evident that the Interpretative Bulletin heretofore quoted also makes no distinction between the two clauses of the section so far as construction workers are concerned.

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[3] Mitchell v. Chambers Const. Co., 214 F.2d 515, 12 WH Cases 209 (C.A. 10, 1954); Chambers Construction Co. v. Mitchell, 233 F.2d 717, 12 WH Cases 889 (C.A. 8, 1956).

The following principles seem soundly established in Fair Labor Standards Act cases:

(1) Congress did not intend to make the scope of this Act coextensive with its power to regulate commerce.[4]

(2) But within its coverage, the Act is to be construed liberally to apply to the furthest reaches consistent with Congressional direction.[5] The policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce."[6]

(3) The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be in practical effect a part of it rather than isolated, local activity.[7]

(4) The question whether an employee is engaged in commerce is determined by practical considerations.[8]

(5) Projects involving repair, extension, or relocation of existing facilities or instrumentalities

[4] Mitchell v. Lublin, 358 U.S. 207, 14 WH Cases 13 (1959); Walling v. Jacksonville Paper Co., 317 U.S. 564, 2 WH Cases 63 (1942); McLeod v. Threlkeld, 319 U.S. 491, 2 WH Cases 75 (1943); Kirschbaum Co. v. Walling, 316 U.S. 517, 2 WH Cases 34 (1942); Huke v. The Ancilla Domini Sisters, supra.

[5] Mitchell v. Lublin, supra; Walling v. Jacksonville Paper Co., supra; Mitchell v. Vollmer & Co., 349 U.S. 427, 12 WH Cases 522 (1955); Overstreet et al v. North Shore Corporation, 318 U.S. 125, 2 WH Cases 68 (1943); Huke v. The Ancilla Domini Sisters, supra.

[6] Mitchell v. Lublin, supra.

[7] Mitchell v. Lublin, supra; Mitchell v. Vollmer & Co., supra.

[8] Mitchell v. Vollmer & Co., supra; Overstreet et al v. North Shore Corporation, supra; 10 East 40th Street Co. v. Callus, 325 U.S. 578, 5 WH Cases 377 (1945).

of interstate commerce bring employees within the Act[9] as to those projects improving existing facilities.[10]

(6) Mere separation of an occupation from the physical process of production does not preclude the application of the Act.[11]

(7) But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line.[12]

(8) The applicability of the Act is dependent on the character of the employee's (not the employer's) work.[13]

In the precedent involving workers, the following are some of the instances where employees have been held covered by the Act:

Draftsmen, fieldmen and office workers for an architectural and engineering firm designing public and industrial projects and military air bases in and out of the state;[14] employees producing road surfacing material, 85½% of which was used on

[9] Mitchell v. Lublin, supra; Mitchell v. Vollmer & Co., supra; Overstreet et al. v. North Shore Corporation, supra; Mitchell v. Chambers Const. Co., supra; Chambers Construction Co. v. Mitchell, supra; Tobin v. Pennington-Winter Const. Co., Inc., 198 F.2d 334, 11 WH Cases 11 (1952); Fitzgerald Co. v. Pedersen, 324 U.S. 720, 5 WH Cases 242 (1945); Giannini v. Standard Oil Company, 130 F.Supp. 740 (1955).

[10] Mitchell v. Vollmer & Co., supra; Tobin v. Pennington-Winter Const. Co., Inc., supra.

[11] 10 East 40th Street Co. v. Callus, supra; Kirschbaum Co. v. Walling, supra.

[12] 10 East 40th Street Co. v. Callus, supra.

[13] Walling v. Jacksonville Paper Co., supra; McLeod v. Threlkeld, supra; Kirschbaum Co. v. Walling, supra.

[14] Mitchell v. Lublin, supra.

interstate roads;[15] field workers and bookkeeper for irrigation company;[16] employees constructing new lock and canal in Louisiana, which would form part of Intercoastal Waterway, an alternate route to the existing lock and canal;[17] employees repairing washed out bridge abutments;[18] employees raising and lowering bridges and maintenance and repair of bridge;[19] employees clearing site for dam;[20] local delivery men completing interstate shipment of merchandise;[21] building maintenance employees whose tenants principally engaged in production of goods for commerce;[22] employees producing materials to be used in construction of causeway and of plant to make materials;[23] employees making new reservoir and chlorinator house for water system,[24] and employees constructing new segment as replacement in city's water supply.[25]

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[15] Alstate Construction Co. v. Durkin, Secretary of Labor, 345 U.S. 13, 11 WH Cases 274 (1953).

[16] Farmers Irrigation Co. v. McComb, 337 U.S. 755, 9 WH Cases 1 (1948).

[17] Mitchell v. Vollmer, supra.

[18] Fitzgerald Co. v. Pedersen, supra.

[19] Overstreet et al v. North Shore Corporation, supra.

[20] Tobin v. Pennington-Winter Const. Co., supra.

[21] Walling v. Jacksonville Paper Co., supra.

[22] Kirschbaum Co. v. Walling, supra.

[23] Archer v. Brown & Root, Inc., 241 F.2d 663, 13 WH Cases 175 (C.A. 5, 1957).

[24] Mitchell v. Chambers Const. Co., supra.

[25] Chambers Construction Co. v. Mitchell, supra.

The following employees were held not within the Act:

> Maintenance employees of typical metropolitan office (not manufacturers') building;[26] cooks for interstate railroad maintenance men;[27] and construction workers on new replacement dam for water system.[28]

The basic issue of this controversy seems to be whether the coverage as to construction workers making an enlargement of a facility, which coverage has been read into the Act's provisions relating to employees "engaged in commerce," is also to be read into the following clause pertaining to employees "engaged in the production of goods for commerce," or "in any closely related process or occupation directly essential to the production thereof." As stated by the Zachry opinion the reasons for not so extending the Act's coverage are that the 1949 amendment to the latter clause seemingly makes it more restrictive than theretofore, and the fact that the latter clause is itself one more step removed from interstate activity than employees "engaged in commerce" covered by the first clause. Or, to put it more specifically, a construction worker adding a new segment to a road is but one step removed from interstate transportation facility, whereas the one adding a new segment to a water system, is two steps removed, i.e., the water is transported therethrough to the facility which in turn uses it for interstate products.

As all the decisions repeatedly state, the line is a difficult one to draw. However, the precedent has so frequently included construction workers making repairs or enlargements and not simply completely new

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[26] 10 East 40th Street Co. v. Callus, supra.

[27] McLeod v. Threlkeld, supra.

[28] Zachry Company v. Mitchell, 262 F.2d 546, 14 WH Cases 17.

constructions into the coverage of the Act, that the Zachry decision does not represent the weight of authority. This conclusion is substantiated by the Senate Conferees Report intimating that employees making enlargement of facilities are within the coverage of the Act, and by the fact that the Secretary of Labor has so determined in his Interpretative Bulletin. If his interpretation is in conflict with the statute, it would be ineffectual. In view of the oft repeated rule that the Act is to be construed liberally to apply to the furthest reaches consistent with Congressional direction, doubt is resolved in favor of the coverage of these employees by the Act. Supportive of this conclusion are the two Chambers decisions, quotations from which are set forth below.[29]

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[29] Chambers Const. Co. v. Mitchell, 233 F.2d 717, 12 WH Cases 889, C.A. 8, 1956:

P. 719-20. "The Company is engaged in the general contracting business, specializing in construction and reconstruction work upon municipal water and sewer systems. • • • [T]he company contracted with the City • • • for the construction of a segment of the city's water supply main crossing the Big Blue River. This *new segment* (a 16-inch pipe 221 feet long) *was intended to be a replacement for a similar segment* which, for reasons of safety and security, had to be abandoned. The contract also involved certain piping changes and valve installations. Work on the proposed replacement took place while the old main was still being used, the plan being that *the new line would be interspliced on completion* with a minimum of interference with the city's water supply intake.

"*The water* carried by the supply main at the time in question was used by the City • • • and *was sold by the city to its customer water users, some of which were railroads* engaged regularly and continuously in interstate commerce. *Other users included industrial firms using the water in various ways incident to manufacture of their products, which products were distributed and sold in interstate commerce.*

P. 721. "The trial court, following the so-called 'new construction rule,' stated: ' • • • that the construction of an entirely new facility, • • • a highway, which after construction is utilized for interstate commerce is not within the reach of the Act.'

"But the court concluded: 'But the improvements in those cases are not comparable to replacement of the river crossing in the • • •

water main. *The erection* which was made under the * * * contract *was not susceptible of use by itself or otherwise than through its incorporation into the lang water carrying main in replacement of the former river crossing segment.* * * * The so-called 'new' segment is a replacement or repair designed only for that purpose and of no value or service otherwise. * * *

P. 721. "In our opinion, *the Vollmer decision infers that the 'new construction rule' is not applicable to the repair or replacement of existing facilities. This is not a change in the law. It has been true ever since the F.L.S.A. was passed in 1938.*"

P. 722. "Nevertheless, without considering whether the Vollmer language does change or eliminate the 'new construction rule,' as contended by appellants, it is obvious that the type of 'replacement-improvement' construction involved in that case is not in all respects similar to a 'replacement' construction such as we have here. * * * "

Mitchell v. Chambers Const. Co., 214 F.2d 515, 12 WH Cases 209 (C.A. 10 (1954)):

P. 516. "The material facts are that the appellee entered into a contract with the City of Cheyenne, Wyoming, for the *construction of a reservoir and chlorinator house, which when completed would augment the city's water system.* In addition to the concrete reservoir and a chlorinator house, the contract called for the construction of a connecting pipe line from existing wells and reservoirs to the new reservoir and through the chlorinator house. * * * The new reservoir and chlorinator house were located about five and one-half miles from the city in a pasture, no portion of which had ever been connected or used as a part of the city's water system. * * *

"The city furnishes large quantities of water to employers engaged in commerce and in the production of goods for commerce. And, we know that employees engaged in an occupation directly essential to the production of goods for commerce are themselves engaged in the production of goods for commerce. (Citing cases.) We also know that workmen engaged in repairing, replacing, *enlarging* or improving an existing interstate facility are covered by the Act as employees engaged in commerce * * *. On the other hand, it is equally plain that employees engaged in the original construction of a project or facility not yet dedicated to the channels of commerce or to the production of goods for commerce are not within the coverage of the Act, even though the facility or project, when completed, will be in the channels of interstate commerce or utilized in the production of goods for commerce. The question in each case is governed by the facts. * * *

An injunction will issue in accordance with the prayer of the complaint.

"The appellant earnestly and plausibly contends that the project to augment the city s water supply was no more than an addition to or an enlargement of an existing water system to meet its expanding needs, and the fact that it was physically removed from the existing system and was not immediately connected to the distribution system as an integral part of it, was immaterial. And, we are inclined to agree." (Emphasis ours.)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum decision of the District Court on the petition for preliminary injunction (R. 43–47) is not reported. The memorandum opinion of the District Court upon final disposition of the case (R. 71–76) is reported unofficially at 13 W.H. Cases 881. The opinion of the Court of Appeals (R. 91–99) is reported at 262 F. 2d 546.

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1959 (R. 99). By order of Mr. Justice Black, dated March 26, 1959, the time for filing a petition for a writ of certiorari was extended to June

1, 1959 (R. 100). The petition was filed on May 29, 1959, and was granted on October 12, 1959 (R. 100). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent is a large construction contractor engaged primarily in the construction of industrial projects, including highways, railroads, airfield facilities, power lines, dams and water facilities. The employees involved here have been engaged in the construction of a six million dollar dam and reservoir (the physical construction part of a 15½ million dollar project), designed to inundate, replace and expand the existing dam and water facilities serving the industrial city of Corpus Christi, Texas, and vicinity, in order to furnish "a much needed and more abundant source of water supply" to insure ability to meet present and increasing requirements. Between 40 and 50 percent of the total water furnished by the City has been to industrial users. A substantial proportion of the water furnished and to be furnished by the City is to interstate instrumentalities such as railroads, truck transportation companies and the airport, and to producers of goods for interstate commerce (which include "practically all of the major industries" in the City and vicinity).

The primary question presented is:

1. Whether respondent's employees engaged in the construction of this project were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

If the trial court was correct in ruling that this

construction project was within the Act's coverage, another question presented is:

2. Whether an injunction restricted to this single project (construction of which was virtually completed by the time judgment was entered) is an adequate exercise of the judicial authority provided by Section 17 of the Act to restrain future violations, where the employer has violated the Act on other projects in the past and has not made, or agreed to make, restitution of substantial underpayments due employees for past violations.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) are set forth in the Appendix, *infra,* pp. 82–83.

STATEMENT

1. This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act. Respondent is a large construction company, incorporated in Delaware with its principal office in San Antonio, Texas (R. 3, 14), engaged primarily in the construction of industrial projects such as highways, railroads, power lines, dams, and water facilities (R. 91). In the three years before trial, it had completed a total of 185 projects valued at over $77,000,000, most of which projects were concededly of an interstate character subject to the Fair Labor Standards Act (R. 74–75).

The project in question was a $6,170,378 contract (Plf. Exh. 7)[1] for the construction of a dam and impounding facilities—the physical construction part of a project costing a total of 15½ million dollars (R. 26)—on the Lower Nueces River near Mathis, Texas, referred to in these proceedings as the Mathis Dam. Construction of the project continued over a period of approximately two years,[2] during which time a large number of construction workers, ranging from 85 to 400, were employed by respondent on the project (R. 14–15). Noncompliance with the overtime requirements of the Act with respect to these construction workers is undisputed,[3] respondent contending that they were not covered by the Act (R. 44). The difference between the amounts paid to these employees and the amounts that would be due under the Act was estimated by the Government investigator to be

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[1] Since the exhibits in this case are documents of considerable length, the Court of Appeals granted the joint motion of the parties to file only the original documents with the record on appeal (R. 82), and the parties have agreed, by stipulation filed on November 4, 1959, that they should not be printed, but may nevertheless be referred to in brief and argument.

[2] The contract for construction was dated October 1955 (Plf. Exh. 7) and work was scheduled to be completed by the end of 1957 (R. 23). It was more than 99 percent completed at the time of the trial on February 21, 1958 (R. 52).

[3] The violations charged and found relate only to workers "engaged in actual construction work" at the dam (R. 74, 18–19, 22–23).

Respondent paid overtime rates for any work done in excess of eight hours a day, but not for the first eight hours of Saturday work even though an employee had already worked forty or more hours that particular week.

in excess of $70,000 (R. 20), and conceded by respondent to be in the neighborhood of $50,000 (R. 66).

The trial court in its preliminary opinion (after a hearing on the Secretary's motion for a preliminary injunction) (R. 45–46), and again in its final opinion (R. 74), held that the Act was applicable. It declined, however, to enjoin respondent with respect to future similar projects, limiting its injunction to the Mathis Dam project (R. 76–77), which by the time of final judgment was virtually completed (R. 52).

The Court of Appeals reversed the coverage ruling and held that the construction employees at the dam were not covered by the Act (R. 98–99). Accordingly, it did not reach the issue, presented by the Secretary's cross appeal (R. 78–79), whether the trial court, in limiting its injunction to the single (virtually completed) project, had exceeded the bounds of sound judicial discretion.

2. The facts pertinent to the question of coverage are not in dispute.

Respondent was under contract with the Lower Nueces River Water Supply District to build a dam some 1,400 feet downstream from the existing dam (R. 28), which would be submerged upon completion of the new dam, but protected and "maintained intact" until such completion so that the water supply from the existing dam and reservoir would not be interrupted (Plf. Exh. 7)[4]—"to the end that the City [Corpus Christi, Texas] shall continue to have a supply of water uninterfered with by and during con-

[4] See footnote 1, *supra*.

struction operations" (Plf. Exh. 1, p. 4). The project was designed "to furnish the City with a direly needed additional water supply to insure it the ability to meet its present requirements and for its future growth and development," by taking advantage of the City's right to impound more waters of the Nueces River, which could "not be realized by the present impounding facilities" (*id.* at p. 2). The new dam would create a reservoir "of much greater capacity, offering to the City a much needed and more abundant source of water supply than that afforded by the present facilities" (*ibid.*).

According to the trial court's uncontested findings, "the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir, and furnish an adequate water supply for the city" (R. 45). It was, the court found, "the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply" (R. 46).

The city water system serves a district with a population of approximately 200,000, including the industrialized city of Corpus Christi, with a population of approximately 165,000 (R. 30). Among the industries served by, and dependent upon, the city water system are railroads, truck transportation companies, the airport and other instrumentalities of interstate commerce (R. 32–33), and various producers of goods for commerce (R. 35–37). It is conceded that "practically all the major industries in this area" sell their

products in interstate commerce (R. 35) and there "is no dispute that these industries use a large quantity of water"—"it is admitted they use a substantial amount of water in connection with their production of goods, a substantial portion of which move[s] in commerce" (R. 36–37). Corpus Christi is "an important oil refining and shipping center of the Gulf Coast [whose] industries include cotton compressing, production of sheet metals and chemicals,"[5] carbon-black manufacturing, zinc refining, foundries, alkali-chemicals and cement plants, cotton ginning, cottonseed oil mills, and the manufacture of oil-field supplies and paint.[6]

The trial court found that "A substantial amount of the water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce" and "largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce" (R. 45). More particularly, the City's water consumption records show that from 40 to 50% of the total volume of water furnished by the City's existing system during the two years preceding the trial of this case was to industrial users (as distinguished from residential, commercial, hospital, municipal, and other users), and that the amount furnished industrial users averaged more than half a billion gallons a month (Plf. Exh. 6).[7]

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[5] See Moody's *Governments & Municipals*, 1959, p. 1782.

[6] See The Columbia Lippincott Gazetteer of the World (Columbia Univ. Press, 1952), p. 452.

[7] See footnote 1, *supra*.

On the basis of these facts, the District Court concluded that the construction project, "while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished [from] technical conceptions, it is at once an improvement, a rebuilding and a new construction", which was "so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity" (R. 46). Accordingly, it held the construction work to be covered by the Act (1) as "closely related" and "directly essential" to the production of goods for commerce by such water users (R. 72–73); and, in addition, (2) as production of goods "for commerce" by reason of its "supplying goods [water] essential to the functioning of interstate instrumentalities", under the principle of *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13 (R. 45).

However, despite the evidence of prior violations by, and prior litigation with, respondent on other projects, and the need for repeated investigations of respondent in the past, and despite the evidence of the substantial financial advantage acquired by respondent through accumulated unpaid wage deficiencies while contesting and litigating coverage (discussed more fully in the Argument, *infra,* p. 66 *ff*), the District Court declined to grant an injunction restraining future violations generally or on similar

projects, and limited injunctive relief to the single construction project here in issue (which, as above noted, was at that time virtually completed).

3. The Court of Appeals, although recognizing that "[i]ndustries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce" (R. 92), reversed the District Court on the ground that the construction work was not "closely related" and "directly essential" to the production of goods for commerce within the meaning of Section 3(j) of the Act, as amended in 1949 (R. 98–99). It made no reference to the additional ruling of the District Court that the work was covered production of goods "for commerce" under the principle of the *Alstate* decision, *supra*.

In view of its ruling on the coverage issue, the Court of Appeals did not reach the question whether the trial court's narrow limitation of the injunction was within the reasonable bounds of sound judicial discretion.

SUMMARY OF ARGUMENT

I

The Court of Appeals for the Fifth Circuit, reversing the District Court's ruling that the construction work here was "production of goods for commerce" within the coverage of the Fair Labor Standards Act, rejected the lower court's reliance upon this Court's *Vollmer* and *Alstate* decisions[8] and the Eighth and

[8] *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

Tenth Circuits' *Chambers Construction Company* decisions[9] on the ground that *Vollmer* and *Alstate* involved the "in commerce" phase of the Fair Labor Standards Act coverage and therefore afforded "little guidance in construing" the Act's "production of goods for commerce" phase. The Court of Appeals thus mistakenly regarded as irrelevant the "practical considerations" which this Court held determinative of coverage in *Vollmer* and *Alstate* (and most recently in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207), and ignored the undisputed evidence of the direct and vital dependence of the interstate instrumentalities and interstate production facilities upon the large quantities of water supplied by the water system which this construction work was designed to enlarge and replace.

A. If, as we contend, the "liberal" and "practical" standards of *Vollmer, Alstate* and *Lublin* (rather than technical conceptions) are equally as applicable to determining the Act's "production" coverage as its "in commerce" phase, the practical considerations unquestionably support the District Court's decision of coverage. The Statement, *supra*, has made clear the close connection of this project with the many interstate instrumentalities and producers in the area.

Barring technical conceptions such as the "new construction" doctrine on which the Court of Appeals heavily relied, there is no adequate basis for holding that work which is "so directly and vitally related to

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[9] *Chambers Construction Company* v. *Mitchell*, 233 F. 2d 717 (C.A. 8), and *Mitchell* v. *Chambers Construction Co.*, 214 F. 2d 515 (C.A. 10).

the functioning of an instrumentality or facility of interstate commerce" as to be within the scope of the "in commerce" coverage (see *Lublin*, 358 U.S. at 212) is not also "closely related" and "directly essential" to the production of goods for commerce where the functioning of the interstate production facilities is similarly and equally related to and dependent upon the work. Not only the District Court below, but in the three other wage-and-hour cases involving construction of improvement or extensions of similar water systems, the courts have had no hesitancy, upon concluding that the technical "new construction" doctrine was not determinative, in ruling that such construction work was—by realistic practical standards—within the Act's "production" coverage.

The Court of Appeals does not dispute the District Court's findings of the direct and vital dependence of interstate instrumentalities and interstate production facilities upon an adequate supply of water from the system augmented by construction of the Mathis Dam, but rejects the lower court's coverage ruling primarily on the twin premises: (*a*) that the "new construction" doctrine, admittedly discredited by this Court as a test for determining the "in commerce" coverage of this Act, nevertheless remains intact as a test for determining the Act's "production" aspect of coverage, and (*b*) that the 1949 amendment to Section 3(j) was designed to exclude all such construction work from the scope of the Act's "production" coverage as "local" enterprise. Neither assumption is waranted, and we

deal with them before spelling out the further details of our affirmative case for coverage.

B. The Court of Appeals' reliance on the artificial "new construction" doctrine is inconsistent with the principles and rationale of this Court's decisions, and also erroneously assumes that that doctrine is applicable to projects for the improvement, extension or replacement of existing facilities.

1. The view that *Vollmer's* rejection of the "new construction" concept relates only to the Act's "in commerce" coverage disregards the principle on which that holding rests. In rejecting "technical conceptions", *Vollmer* was following this Court's prior rulings in "production", as well as in "in commerce", cases, as is evident from the Court's specific reliance upon two "production" cases—*Kirschbaum Co.* v. *Walling*, 316 U.S. 517, and *Alstate, supra* The teaching of this line of decisions is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 499; emphasis added), but rather whether the relationship of the work to the "end [interstate] product" (see *Lublin*, 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.

2. As applied to the present case, the Fifth Circuit's extension of the "new construction" doctrine to exclude from coverage work on projects for ex-

pansion or replacement of existing facilities is also inconsistent with the recent *Lublin* ruling that "[w]hatever vitality the 'new construction' doctrine retains after *Mitchell* v. *Vollmer & Co., supra,* and *Southern Pacific Co.* v. *Gileo* [*supra*], it is not applicable here because, as the record shows, [the project] involved the repair, *extension, or relocation of existing facilities*" (358 U.S. at 213; emphasis added).

Long before *Lublin,* it had been firmly established that construction work for the improvement, expansion or "redesigning" of existing facilities of interstate commerce "falls in the same category" as "[r]epair of facilities of interstate commerce" (*Vollmer,* 349 U.S. at 429–430). The legislative explanation of the scope of the "closely related" and "directly essential" language of the 1949 amendment to Section 3(j), similarly, had placed in the same category of employees "who would remain covered" "[e]mployees [engaged in] repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods" (95 Cong. Rec. 14874–75; emphasis added).

3. Thus, the Fifth Circuit's reliance here on *Murphey* v. *Reed,* 335 U.S. 865, and other pre-*Vollmer* "original" construction decisions, is misplaced. We do not believe that the short *per curiam* order in *Murphey* v. *Reed* (issued, by a closely divided Court, before the question of the applicability of the new construction doctrine to this Act had been directly or adequately presented for judicial consideration) should be viewed as warranting a less practical and realistic reading of the Act's "production" cover-

age than of its "in commerce" coverage. But, in any event, as applied to the present case, the Fifth Circuit's reading of the *Murphey* decision is inconsistent with the principle that the " 'new construction' doctrine * * * is not applicable * * * [to] projects involv[ing] the repair, extension, or relocation of existing facilities" (*Lublin, supra*).

4. The Fifth Circuit's assumption that the "production" phase of coverage is to be more narrowly read than the "in commerce" phase—at least with respect to construction work—is likewise contrary to the previously settled view that "the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce' " (*Tobin* v. *Johnson,* 198 F. 2d 130, 133 (C.A. 8), certiorari denied, 345 U.S. 915; *Armour & Co.* v. *Wantock,* 323 U.S. 126, 131). While *Armour* antedated the 1949 amendments to the "necessary"-to-production language, the legislative history of that change clearly contradicts the Fifth Circuit's premise that the amended language so radically narrowed the previous scope of "production" coverage as to result in the exclusion of work of this type. "The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942); it "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). These general statements of legislative purpose were supple-

mented by a detailed list of specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language, including the very decisions enunciating the "liberal" and "practical" standards applied by this Court in *Vollmer, Alstate* and *Lublin, supra.* Plainly, the rationale of *Vollmer* and *Lublin* goes to the coverage of the Act generally and has no special relation to the "in commerce" branch. There is no plausible reason, and there is nothing in the statutory text, the legislative history, or the factual context of the two branches of coverage, why "technical conceptions" rather than "practical considerations" should be the criteria in one phase but not the other.

C. Putting to one side the erroneous assumption that the "new construction" doctrine governs here and that the 1949 Amendments removed coverage of this type of work, we believe that the existing judicial precedents, confirmed by the 1949 legislative history, establish the Act's coverage of this construction work, not only as "closely related" and "directly essential" to production of goods for commerce, but as actual "production" of "goods" [water] "for commerce," in the primary sense.

1. (*a*). There is no dispute that, if respondent's construction employees were merely engaged in maintenance and repair of the existing Corpus Christi water facilities, they would be within the Act's coverage as engaged in work "closely related" and "directly essential" to production of goods for commerce. This has long been settled by a consistent

line of decisions, both before and after the 1949 Amendments, upholding the coverage of employees engaged in repair and maintenance of the facilities and equipment of a utility company supplying essential fuel, power, *water,* etc., to interstate instrumentalities and interstate producers.

(*b*). As we have already indicated (*supra,* p. 14), the 1949 amendment to Section 3(j) was not intended to limit this well settled area of coverage. Indeed, the specific decisions most pertinent to the instant case were affirmatively approved by the Senate Conferees' report, along with the explicit statement that the amended language would cover, *inter alia,* employees engaged in "[p]roducing and supplying fuel, power, *water,* or other goods for customers using such goods in the production of different goods for interstate commerce" (95 Cong. Rec. 14874–75; emphasis added). See also the House Managers' report (95 Cong. Rec. 14929).

(*c*). The Fifth Circuit's reliance on *10 East 40th St. Co.* v. *Callus,* 325 U.S. 578, reflects its misapprehension of the 1949 legislative intent and its mistaken view that "[r]eference need not be made to Committee reports or other aids by way of legislative history" to determine "the class of employees to be considered engaged in local enterprises" (R. 96). The reconstruction and expansion of a water supply system admittedly designed to meet the substantial and essential manufacturing needs of industrial users in an industrialized city and shipping center, in which practically every major industry is engaged in com-

merce or in the production of goods for commerce and depends upon the improved water system for continued efficient functioning, is hardly comparable to the *Callus* enterprise—the running of an ordinary office building, some proportion of which happened to be rented for use as sales or administrative offices "for the time being" to manufacturing enterprises engaged *elsewhere* in their manufacturing operations. Such a water supply system, wholly unlike a general office building, is necessarily designed to supply the substantial and essential needs of the *manufacturing processes* of major interstate producers, and the fact that the water system is substantially devoted to these particular needs is clearly no mere incidental consequence. And contrary to the view of the court below, the 1949 amendment to Section 3(j) affords no basis for extending *Callus* to this case. Neither the Senate nor House reports made any reference to *Callus,* and there is clearly no implication in the legislative history of any "Congressional mandate" to broaden the "class of excepted occupations" (see opinion below, R. 99) by extending *Callus.*

(*d*). Respondent's contentions that this construction work was too remote as "a matter of geography" and as "a matter of contractual connection" (Br. in Opp., p. 12) are clearly "technical conceptions" having no relevance to the practical functional relationship of the work in question to the production of goods for commerce. That the geographical distance of the activity from the production of goods for commerce is no criterion of the Act's coverage was long

ago settled by *Borden Co.* v. *Borella*, 325 U.S. 679, 681, upholding the coverage of maintenance employees in Borden's New York central office building, although considerably more "geographically divorced from the manufacturing plants." Respondent's theory of "remoteness in contractual connection" is inconsistent with this Court's decisions upholding coverage of construction work performed by employees of an independent contractor, and the irrelevance of such "contractual connection" was expressly recognized in the legislative reports on the 1949 Amendments (95 Cong. Rec. 14875, 14929).

2. Since the construction work here actually produces (impounds) the water for uses essential to the functioning of interstate instrumentalities, it is production of goods "for commerce" under the principle of *Alstate, supra.* The statement of the court below that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (R. 93) ignores the practical engineering fact that the very construction of the dam and reservoir impounds or "produces" the water ("goods"), just as coal, natural gas and oil are captured or "produced" by digging or drilling. See *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, 44 (C.A. 5), affirmed 317 U.S. 88, 91. Since this construction work was designed to supply water essential to the functioning of interstate instrumentalities (railroads, trucks, an airport, etc), the workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for the use in

the construction of interstate highway improvements in *Alstate,* or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see *Alstate,* 345 U.S. at 16, fn. 4).

3. Finally, an additional ground for the Act's coverage of the type of construction work here involved—not pressed and, therefore, not ruled upon in either court below (see Petition for Writ of Certiorari, p. 24, fn. 16)—is that some of the water impounded by the construction of the dam actually moves interstate as an "ingredient" of other products, or in its use in the operation of railroads or trucks. While this ground of coverage has not hitherto been pressed in the instant case, we believe it appropriate to advance it in view of the fact that the decision here will serve as the controlling precedent in determining coverage of employment in similar construction work to enlarge water supply facilities, which as pointed out in the petition for certiorari (pp. 25–26) is of considerable current and ever-increasing importance throughout the nation, as the fast-growing use of water by industries, utilities, and the increasing population, expands.

II

While the grant or denial of injunctive relief under Section 17 of the Fair Labor Standards Act may be a matter within the sound discretion of the District Court, the limitation of the injunction in this case to the virtually completed Mathis Dam project, was, in effect, an unwarranted denial of any relief, resting on a misapprehension of the policies of this particu-

lar Act and of the specific enforcement purposes of the Section 17 remedy. The District Court, evidently leaning upon standards announced by the Fifth Circuit's decisions (*Mitchell* v. *Hodges Contracting Company,* 238 F. 2d 380 and *Mitchell* v. *Bland,* 241 F. 2d 808), relied solely on the supposed "disadvantages" or "peril" to which an employer who "has acted in good faith" might be subjected by an injunction, and ignored the interests of the public, of the underpaid employees, and of complying competitors.

This approach, we submit, is quite wrong, and has seriously aggravated the problem of enforcement in the region within the Fifth Circuit's jurisdiction where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required. By erroneously placing the emphasis strongly on solicitude for the non-complying employer, who has already benefited financially from past violations and is in a position to gain similar benefits from future non-compliance while litigating other cases, the Fifth Circuit's standards have obstructed rather than aided in effectuating the national policy of this Act to suppress a significant type of unfair competition. See *United States* v. *Darby,* 312 U.S. 100, 122.

In view of the specific statutory limitation in Section 17, precluding the courts from granting the ordinary equitable remedy of restoration of unpaid wages resulting from past violations, and limiting the effect of the injunction solely to future prohibition of what the statute itself prohibits, it is difficult to see "what undue burden will be placed on respondent by the issuance of an injunction" (see *Lublin, supra,* 358

U.S. 214). On the other hand, there is special reason for an ungrudging use of the injunction remedy to relieve the enforcement agency of some of the burden and expense of repeated investigations of and litigation with the same non-complying employer, and to assure employees and complying competitors that a prior offender will not remain in a position again to profit financially from future non-compliance.

As the instant case indicates, the enforcement problem is particularly acute in the construction industry where any particular project is virtually completed before a case can be investigated and litigated to final judgment. By the time of the trial court's final judgment, the accumulated wage deficiencies estimated by the Government investigator to be in excess of $70,000 (R. 20), and conceded by respondent to be about $50,000 (R. 66), remained unpaid. In these circumstances, the injunction issued by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project.

Since the effect of the Section 17 injunction is solely "remedial and not punitive," we submit that neither "good faith" reliance upon advice of counsel, nor undue caution about imposing supposed "disadvantages" upon such a non-complying employer, should warrant relieving him entirely (at the continued expense of others) of "the burden of any uncertainty" in the future. See *McComb* v. *Jacksonville*

Paper Company, 336 U.S. 187, 193; *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 583.

ARGUMENT

I

EMPLOYEES CONSTRUCTING A DAM AND RESERVOIR TO REPLACE AND ENLARGE AN EXISTING WATER SYSTEM WHICH SUPPLIES LARGE QUANTITIES OF WATER ESSENTIAL TO THE FUNCTIONING OF INTERSTATE INSTRUMENTALITIES AND TO THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE ARE ENGAGED IN "PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

The District Court, relying principally on *Mitchell* v. *Vollmer & Co.,* 349 U.S. 427, and the decisions of the Eighth and Tenth Courts of Appeals in *Chambers Construction Company* v. *Mitchell,* 233 F. 2d 717 (C.A. 8) and *Mitchell* v. *Chambers Const. Co.,* 214 F. 2d 515 (C.A. 10), emphasized the direct and vital dependence of the interstate instrumentalities, and of the manufacturing processes of the producers of goods for commerce, upon the large quantities of water supplied by this water system. It concluded that construction work designed to improve, enlarge or replace such a water system, even though "new construction", is both "closely related" and "directly essential" to production of goods for commerce, and also production of goods "for commerce" in the primary sense (*i.e.,* production of the water essential for the functioning of interstate instrumentalities) under the principle of *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13.

The Court of Appeals, in reversing the District Court, rejected its reliance upon *Vollmer* and *Chambers*, on the grounds that *Vollmer's* rationale was limited to the Act's "in commerce" coverage and that the Eighth Circuit in *Chambers* had erroneously "equated the new construction concept as to instrumentalities of commerce, *Mitchell* v. *Vollmer, supra*, with construction of facilities to be used for production of goods" and had thereby failed to recognize "the distinction between these two bases for coverage" (R. 98). Stating that it could "derive little guidance in construing the definition section relating to production of goods for commerce" from *Alstate* and *Vollmer* (R. 98) (apparently overlooking that *Alstate* was a "production" case), the Court of Appeals disregarded the "practical considerations" underlying the coverage rulings in *Vollmer* and *Alstate*, as well as in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207.

If, as we contend, the *Vollmer* and *Lublin* "liberal" and "practical" standards (rather than technical conceptions) are no less applicable to determining the Act's "production" coverage, the practical considerations of the instant case (comparable to the considerations held determinative in *Vollmer* and *Lublin*) are of foremost importance, and they unquestionably support the District Court's view that construction work designed to improve, enlarge or replace this water system "is so directly and vitally related to furnishing water" which is "essential to the functioning of interstate instrumentalities" and to the manufacturing processes of the producers of goods for commerce,

"as to be in practical effect an unbroken chain in, and a part of, such commerce rather than an isolated, local activity" (R. 45–46).

A

PRACTICAL CONSIDERATIONS SHOW THE DIRECT AND VITAL RELATIONSHIP OF THIS CONSTRUCTION WORK TO THE INTERSTATE INSTRUMENTALITIES AND PRODUCTION FACILITIES DEPENDENT UPON THE WATER SYSTEM

1. It is undisputed that the interstate instrumentalities (railroads, trucking transportation, the airport, the telephone company, etc.) and the major industrial plants in the city of Corpus Christi, Texas, and vicinity, "practically all" of which plants produce goods for interstate sale (R. 35–36), require large quantities of water essential to their functioning or productive processes; that these water requirements have been and will continue to be dependent upon the water system, which the construction project here in issue was designed to replace and enlarge; and that this replacement-expansion project was "direly needed" to enable adequate and efficient operation of the existing water system to meet "present requirements" as well as to provide for "future growth and development" (Pltf. Exh. 1, p. 2, 4; R. 45–46).

Water is obviously an essential element in the operation of an industrial complex such as Corpus Christi possesses (see the Statement, *supra*, pp. 6–7). Certainly, railroads, trucking companies, and airports are continuously dependent upon water in the mechanical operation of their vehicles and facilities,

in the refrigeration of freight, in the maintenance of plant and equipment, in the provision of adequate protection against fire hazard, and in the furnishing of accommodations essential to passenger service. In addition to the water needs of such interstate instrumentalities, practically all of the major factories and processing plants in the area, which sell their products in interstate commerce, are also dependent on this water. It is a major supply of power in the form of steam. It is an essential material for the heating of plants and equipment by steam or hot-water systems. It is needed for the cooling of equipment and materials subjected to high temperature processes, for the cleansing of materials and products, for the disposition of industrial waste, for chemical processes, for refrigeration, for sanitation and maintenance of plant and equipment, for fire protection, and for incorporation into various manufactured products. It is inconceivable that a city like Corpus Christi could maintain its level of commercial production if these industrial water requirements were not met.

These are the "practical considerations," in the "pattern of modern industrial organizations" and "the process of economic development" (see *Borden Co.* v. *Borella,* 325 U.S. 679, at 683–684; *Farmers Irrigation Co.* v. *McComb,* 337 U.S. 755, at 761), which relate the construction of the Mathis Dam and Reservoir to the functioning of interstate instrumentalities and the production of goods for interstate commerce, as directly as the construction of an alternate route in

the waterway in *Vollmer* was related to the interstate transportation thereby facilitated, and as the preparation of plans and specifications in *Lublin*, or the preparation of road materials in *Alstate*, were related to the interstate use of the instrumentalities there being repaired, extended or relocated.

In *Vollmer*, the practical consideration held determinative was the fact that the existing canal facilities "already heavy with traffic," were "inadequate" to handle the growing demands of the interstate traffic using the waterway (349 U.S. at 430), and that the new lock was designed to meet this need. The practical case is the same here. The construction of a dam that would provide the additional water supply "direly needed" to meet the current and growing requirements of the area is equally vital and closely related to the functioning of the interstate instrumentalities and the producers for commerce served by the water supply system.

Admittedly, as this Court noted in *Lublin*, "In our modern, technologically-oriented society, the elements which combine to produce a final product are diffuse and variegated," and "[d]eciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem" (358 U.S. at 212). But we submit that, as in *Lublin*, the circumstances present here warrant "no hesitancy in concluding" that the water supplied by this construction project is also "directly related" and "vital" to the end products. In *Lublin*, the governing practical consideration was "because, without the prepara-

tion of plans for guidance, the construction [of improvements or extensions of various air bases, roads, turnpikes, bus terminals, and radio and television installations] could not be effected and the facilities could not function as planned" (358 U.S. at 212). Plainly, without the present necessary construction to expand the water supply, the interstate instrumentalities and production facilities "could not function as planned." The vital importance of an adequate water supply to the functioning of most industries has always been well known, as is evident from the common practice of advertising the available water supply as an incentive to industries to locate in a particular area. And, just as "plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased" (see *Lublin, ibid.*), so construction of enlarged water reservoirs has taken on even greater importance with the increased needs of industries and the newly developed industrial processes requiring enormous amounts of water.

In the instant case, from 40% to 50% of the total volume of water furnished by the existing system during the two years (1955–1957) preceding the trial of this case was to industrial users (see the Statement, *supra,* p. 7). "Use of water by industries and utilities is the fastest-growing segment of [the Nation's] water consumption" (*America's Water Needs: Their Investment Significance,* Domenick & Domenick, N.Y., May 1957 pp. 4–5). American industry, according

to the latest estimates of the United States Department of Commerce, used more than ten times as much water in 1955 as it did in 1900, and almost half as much again as it did in 1950, consuming in 1955 roughly 45% of the total water supply (Business Services Bulletin No. 136, "Water Use in the United States, 1900–1975," table 1), and its proportionate use of the water supply is also climbing.[10]

[10] There is a considerable and fast-growing demand throughout the country for additional supplies of water, a trend which is expected to require, by 1975, more than twice the amount of water now being used (*Natural Resources*, from "The Challenge to America: Its Economic and Social Aspects," a Special Studies Report of the Rockefeller Bros. Fund, 1958, printed in pertinent part at 105 Cong. Rec. 1049).

In absolute figures, the amounts of water consumed in industrial operations are enormous. Electric utilities alone consume 60 billion gallons daily in the steam generation of power, using 75 gallons for each 1,000 kilowatt hours; and a single large steel mill may alone consume 500 million gallons a day (*America's Water Needs*, *supra*). The manufacture of a ton of rayon requires 300,000 gallons of water, and the United States turns out 600,000 tons of rayon a year (*Natural Resources*, *supra*). As the production of kilowatt hours of power, and tons of steel and rayon and other water-consuming products increase, along the well-known current projections of established trends, these figures of water consumption will swell correspondingly. "The recent and current industrial expansion * * * has resulted in a tremendous increase in the total withdrawal of water * * *. This increase in industrial water requirement has strained the capacity of the developed water supplies in many areas * * *." U.S. Geological Survey, *Water Requirements of the Pulp and Paper Industry*, Washington, D.C., 1957, p. iii. The continuing extent of the strain is indicated by the estimate, noted above, that by 1975 "the increase in our population, coupled with the growth of industries which require large quantities of water, will more than double the current rate of water consumption". (*Natural Resources*, *supra*).

2. There is no warrant in this Court's decisions for the evident assumption by the Fifth Circuit that "practical considerations" are less relevant in determining whether particular activities are sufficiently related and essential to interstate commerce to be included within the general terms of the Act's "production" coverage, than they are in making such determination for purposes of "in commerce" coverage. See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Co.* v. *Walling*, 326 U.S. 657; *Borden, supra; Alstate, supra;* all of which were "production" cases. See also *infra*, p. 42 *ff*. Thus, absent evidence of *legislative* intent to exclude such pratical considerations and to restrict "production" coverage more rigidly and narrowly than "in commerce" coverage,[11] there is no sound basis for the conclusion that work which is "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce" as to be within the scope of the "in commerce" coverage (see *Lublin*, 358 U.S. at 212) is not, also, "closely related" and "directly essential" to the production of goods for commerce where the functioning of the interstate production facilities is similarly and equally related to and dependent upon such work.

It is not without significance that in the three other wage-and-hour cases involving construction of improvements or extensions of similar water systems, the courts, upon holding that the technical "new construction" doctrine was not determinative, uniformly

[11] As more fully developed (*infra*, pp. 44–46, 49 *ff*.), the legislative history shows clearly that there was no such intent.

ruled, on the basis of the realistic practical considerations, that the construction work was "closely related" and "directly essential" to the production of goods for commerce.

The Eighth Circuit in *Chambers, supra* (decided June 5, 1956) upheld coverage of employees engaged in the construction of a new water main to replace and expand part of the existing municipal water system of the city of Beatrice, Nebraska, whose customers, as here, included railroads, and industrial firms using the water in various ways to manufacture products sold in interstate commerce. And the Tenth Circuit, in the earlier *Chambers* case (decided prior to this Court's *Vollmer* decision) expressly agreed with the Labor Department's view that the Act covered the construction of a new reservoir and chlorinator house designed to connect with and substantially augment the water system of the city of Cheyenne, Wyoming, which, like the Corpus Christi system, furnished large quantities of water both to interstate instrumentalities and to industries engaged in the production of goods for commerce, since it was "an addition to or enlargement of [the] existing water system to meet its expanding needs."[12] Simi-

[12] The Court of Appeals below summarily dismissed the Tenth Circuit's decision as one which "did not need to, and did not, decide the issue" of coverage (R. 98). Coverage, however, was the primary issue on appeal, and although the court's actual decision rested on the ground that its position on coverage was "not decisive of the ultimate question whether the trial court abused its discretion in denying an injunction" (214 F. 2d at 517), its view on the coverage issue was deliberately expressed after full and elaborate consideration of the facts and author-

larly, the recent decision in *Mitchell* v. *S. A. Healy*, (June 23, 1959, N.D. Ill., 14 WH Cases 262, not yet officially reported) (now on appeal to the Seventh Circuit, No. 12777), upheld the coverage of employees engaged in construction of a new water tunnel to expand the capacity of the Chicago water system, relying upon the two *Chambers* decisions, and expressly rejecting the Fifth Circuit's decision in this case as "not represent[ing] the weight of authority" which was substantiated by the legislative history of the 1949 amendment to Section 3(j) of the Act.

3. The Fifth Circuit does not dispute the vital dependence of the interstate instrumentalities and interstate production facilities in the Corpus Christi area upon an adequate supply of water from the system which was augmented by construction of the Mathis Dam, but bases its conclusion primarily on the premises (*a*) that the "new construction" doctrine, admittedly discredited by this Court as a test for determining the "in commerce" coverage of this Act (*Vollmer* and *Lublin, supra;* and *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493), nevertheless remains intact

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ities. It was far from a casual dictum, and is, therefore, entitled to more weight than was accorded it below. Cf. *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143. Indeed, the Fifth Circuit itself, in a prior decision by a different panel, cited the Tenth Circuit's *Chambers* decision as authority for its ruling that a new building constructed as "an improvement of an existing facility—an operating radio station" is within the coverage of the Act "in any vintage," and that *Vollmer*, "decided subsequent to the Trial Court's action, made it [coverage] doubly sure." *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, 384 (C.A. 5).

as a test for determining the Act's "production" aspect of coverage, and (*b*) that the 1949 amendment to Section 3(j) was designed to exclude all such construction work from the scope of the Act's "production" coverage as "local" enterprise, thus reversing the pre-1949 recognition that "production" coverage was of even greater breadth than "in commerce" coverage.

We shall show that the Fifth Circuit has not only misconceived the basic rationale of *Vollmer* and *Lublin, supra,* but has extended the technical "new construction" doctrine beyond its previous application to "original" construction; and that it has also misconstrued the 1949 amendment to Section 3(j). In addition, we shall show that the District Court's decision below and the two *Chambers* decisions, *supra,* not only correctly apply the principles of this Court's decisions, but are supported by a long line of previous judicial precedents, involving closely parallel circumstances, which received explicit legislative approval at the time of the enactment of the 1949 Amendments. Since the Fifth Circuit's holding rested primarily on its incorrect views as to the applicability of the "new construction doctrine," we shall first discuss that point before further developing the affirmative grounds of coverage on the basis of the pertinent judicial and legislative materials.

B

THE ARTIFICIAL "NEW CONSTRUCTION" DOCTRINE IS INAPPLICABLE

The Fifth Circuit's view that *Vollmer's* rejection of the "new construction" concept relates only to the

Act's "in commerce" coverage disregards the principle on which that holding rests. While *Vollmer* was concerned with a project involving the Act's "in commerce" coverage, reliance was placed on two "production" decisions (*Kirschbaum* and *Alstate*[13]) to support its specific ruling that the Act's coverage is not to be controlled by the "new construction" concept (derived from decisions under an Act "of another vintage") (349 U.S. at 429).[14] *Vollmer's* ruling that "in commerce" coverage is to be "determined by practical considerations, not by technical conceptions" is, in our view, contrary to the inference drawn by the court below that the "production" phase of the Act's coverage may be determined by such "technical conceptions."

In rejecting "technical conceptions," *Vollmer* was following this Court's prior rulings in "production," as well as in "in commerce," cases.[15] *Kirschbaum,*

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[13] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[14] It seems of some significance that the *Vollmer* opinion, throughout, invariably speaks in terms of "an instrumentality or *facility* of interstate commerce" (emphasis added), as does the more recent *Lublin* opinion, 358 U.S. 207.

[15] That *Vollmer's* rejection of the "new construction" doctrine was not limited to "in commerce" coverage seems plain enough on the face of the opinion. The Court explained that the doctrine had its origin in a decision construing the Federal Employers' Liability Act, *Raymond* v. *Chi., Mil. & St. P. Ry. Co.*, 243 U.S. 43, and followed with the statement: "We do not think that case should control this one. We are dealing with a different Act of another vintage—one that has been given a liberal construction from *Kirschbaum* * * * to *Alstate* * * *". (both of which were "production" cases).

one of the earliest decisions on coverage, had established that no "dependable touchstone" or "rigid formulas" or "general propositions" could be used to determine "whether employees are 'engaged in commerce *or in the production of goods for commerce,*'" but that "the larger considerations of national policy, legislative history, and administrative practicalities * * *" must govern the judicial construction of Section 3(j) (316 U.S. at 520, 523, 526, emphasis added). Other "production" decisions had emphasized the national social purposes of the Act and the broad statutory coverage definitions, which were plainly designed to achieve the "[b]readth of coverage * * * vital to its mission" and must be construed by "practical judgment" not by any "hard and fast rule" (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 665). *Kirschbaum's* covering of employees of an independent company furnishing building space and maintenance to interstate producers, and *Roland's* covering of employees of an independent enterprise engaged in repairing and reconstructing motors for use in the production of goods for commerce, rested on the ground that the work of the employees had a "close and immediate tie with the process of production for commerce" and was "an essential part of it" (316 U.S. at 525–526; 326 U.S. at 665; see also *Callus*, 325 U.S. at 584)—a test which is virtually identical to the "closely related * * * directly essential" language of the 1949 Amendments, *infra*, pp. 44–46, 49–53, 82–83. And, since *Vollmer*, the Court has reemphasized this

"practical test" for coverage. *Mitchell* v. *Lublin, McGaughy & Associates,* 358 U.S. 207, 212 (involving "in commerce" coverage), *supra,* pp. 26–27.

As we have already indicated, the teaching of this line of decisions is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo,* 351 U.S. 493, 499; emphasis added), but, rather, whether the relationship of the work to the "end [interstate] product" (see *Lublin,* 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.[16]

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[16] The interpretative bulletin on coverage of the construction industry issued in July 1956 and currently in effect (29 C.F.R. Part 776, Subpart B), on the basis of the *Vollmer* and *Kirschbaum* decisions, states the administrative position to be that "Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula" but that "both phases * * * must be given 'a liberal construction' determined 'by practical considerations, not by technical conceptions' "; that the "new construction" concept would not serve as a reliable test for determining coverage; and that "[s]o far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of 'in commerce' coverage in substantially similiar language as they have used in construing the 'production' phase of coverage" (*id.,* Section 776.22). "Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is 'new construction' nor the fact that it is physically separated from an existing covered plant, is determinative" (*id.,* Section 776.26).

2. Assuming for purposes of argument that the "new construction" doctrine is still with us, then we say, in the language of this Court in *Lublin*, "[w]hatever vitality the 'new construction' doctrine retains after *Mitchell* v. *Vollmer & Co., supra*, and *Southern Pacific Co.* v. *Gileo* [*supra*], it is not applicable here because, as the record shows, [the project] involved the repair, *extension, or relocation of existing facilities*" (358 U.S. at 213; emphasis added).

The Fifth Circuit's extension of this technical doctrine to exclude from the Act's coverage work projects for "extension, or relocation of existing facilities" is difficult to understand. For, long before *Lublin*, it had been firmly established, even in the Fifth Circuit, that the repair, extension, or relocation of existing structures serving interstate commerce or production of goods for such commerce was covered by the Act. Thus this Court in *Vollmer* relied explicitly on the ground that "the work of improving existing facilities of interstate commerce" (which would include construction of the new lock as "part of the redesigning of an existing facility") "falls in the same category" as "[r]epair of facilities of interstate commerce." 349 U.S. at 429–430. And, significantly, the Senate Conferees, in explaining the scope of the "closely related" and "directly essential" language of the 1949 amendment to Section 3(j), similarly had placed in the same category of employees ("who would remain covered") "[e]mployees [engaged in] repairing, maintaining, *improving or enlarging* the buildings, equipment, or other facilities of producers

of goods" (95 Cong. Rec. 14874–75; emphasis added), *infra*, p. 46.

As the Eighth Circuit has pointed out, this holding of *Vollmer* "is not a change in the law"; it "has been true ever since the [Fair Labor Standards Act] was passed in 1938" that "the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*". *Chambers, supra*, 233 F. 2d at 721 (emphasis the court's). Passing by (as unnecessary for decision) the question whether the "new construction" doctrine has survived *Vollmer*, the Eighth Circuit concluded that *Vollmer* only confirmed for the "in commerce" field the principle theretofore administratively and judicially established with respect to the Act's coverage generally. 233 F. 2d at 721–722. Contrary to the Fifth Circuit's assumption that "replacement-improvement" projects were recognized as noncovered "original construction" by the pre-1949 administrative Interpretative Bulletin (Wage and Hour Interpretative Bulletin No. 5, Dec. 2, 1938, revised Nov. 1939), and by the pre-1949 "original construction" court decisions (R. 97), the Eighth Circuit correctly pointed out that "the words 'original construction' in the interpretative bulletin contemplated a different situation than replacement or repairs * * * thus making reliance on that bulletin in this instance ill-advised" (233 F. 2d at 722).[17] See, *infra*, p. 41, fn. 20.

[17] Moreover, the 1939 Bulletin, on which the Fifth Circuit relied, had been expressly superseded and replaced more than 2 years prior to the 1949 Amendments by an interpretative bulletin issued in July 1947, which omitted the "original construction" paragraph entirely (12 F.R. 4583).

The Tenth Circuit, in a pre-*Vollmer* decision, had similarly expressed the view in its *Chambers* case that the "new construction" doctrine was inapplicable to the construction of the new reservoir and chlorinator house since it was "an addition to or an enlargement of an existing water system to meet its expanding needs" (214 F. 2d at 517).

Numerous other cases, before and after *Vollmer*, are to the same effect, many in the Fifth Circuit itself. In *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5), that court, citing *Vollmer*, upheld coverage of the construction of a new building designed to house a radio and television station, on the ground that the radio station when installed would replace an existing radio station operating at another site a mile away. The fact that "radio broadcasting had long been carried on," the court held, "removed [the construction of the new building] from any status of naked 'new' construction for an activity not yet in being." The new building (even though designed, also, to house a new television station not previously in existence) "was therefore an improvement of an existing facility—an operating radio station—and hence, in any vintage, was within the Act. * * * *Vollmer* * * * made it doubly sure" (*id.*, at 384). Similarly, in *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663, the Fifth Circuit held covered the construction of a plant to produce materials for the construction of a causeway, because the causeway, though "physically isolated by considerable distance from the established facilities of which it was to be a functional part,"

would "when completed * * * serve as an important, definite addition to, or improvement of, existing [interstate highway] instrumentalities" (*id.*, at 667). And, again, in *Mitchell* v. *Empire Gas Co.*, 256 F. 2d 781, the court, in upholding coverage of construction of new jet fuel storage tanks on an old abandoned airfield which was being converted into a greatly enlarged modern Air Force base, expressly stated: "[W]e do not need to determine whether the new construction doctrine has been repudiated * * * [where the] construction employees were engaged in the repair, reconstruction and extension of an existing instrumentality of commerce" (*id.*, at 784).[18]

Thus, the proposition that the enlargement of an existing facility is not excluded from coverage as

[18] Accord: *Mitchell* v. *Brown*, 224 F. 2d 359, 363 (C.A. 8), holding that the preparation of plans and specifications for the paving of streets and the enlargement of a power plant of a railroad was not excluded as "new construction" work because it was directed to the "repairs, alterations, additions and improvements to existing facilities"; *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, holding the "new construction" doctrine to be inapplicable to construction of new buildings, machinery, and facilities to replace, improve or enlarge existing production facilities; *Mitchell* v. *Singstad & Baillie*, D. Md., September 28, 1959, 14 WH Cases 314 (not yet officially reported), ruling that the "new construction rule offers no shelter" for employers engaged in constructing a harbor tunnel "intended to serve as an important, definite addition to or improvement of existing identifiable instrumentalities" of highway traffic (*id.*, at 319); *Mitchell* v. *Southwest Engineering Co.*, 170 F. Supp. 310 (W.D. Mo.), coverage not raised on appeal, 271 F. 2d 427 (C.A. 8), construction of buildings which when completed would be used to house aviation control equipment.

"new construction" has been firmly established even in the Fifth Circuit, and the decision below does not take express issue with it as a general principle. The decision relies heavily, however, on *Murphey* v. *Reed,* 335 U.S. 865, and other pre-*Vollmer* "original construction" decisions (see *infra,* p. 41, fn. 20), in concluding that a different standard should be applied in cases—especially construction cases—dealing with "production for commerce" coverage.

3. We do not believe that *Murphey* v. *Reed* warrants such a different reading of the Act's "production" coverage. That short *per curiam* order (by a closely divided Court) gives no explicit indication of its grounds; it was issued before the question of the applicability of the "new construction" doctrine to this Act had been directly or adequately presented for judicial consideration; and the summary disposition of that employee suit was in a context confused and overshadowed by an inadequate record and many other issues.[19] *Vollmer's* characterization of *Murphey* v. *Reed,* as involving "the building of a Navy base, not the improvement of a facility or an instrumentality of

[19] As the Fifth Circuit itself noted in its second decision in *Murphey*, after remand, "many complex, important additional matters" were "not reached or passed on" by this Court's *per curiam* order (232 F. 2d 668, 671). Also, in its earlier opinion the Fifth Circuit had pointed out the inadequacy of the record, stating that the material facts had to be "dredged up from the record which [was] in many respects vague and uncertain," and plaintiffs had "wholly failed to discharge their burden of proving" the connection of their work with interstate commerce (168 F. 2d 257 at 259, 261).

interstate commerce" (349 U.S. at 430, fn. 2), has admittedly left some area of doubt as to "[w]hatever vitality the 'new construction' doctrine retains" (see *Lublin, supra,* 358 U.S. at 213), but as applied to the present case the Fifth Circuit's reading of *Murphey* v. *Reed* is inconsistent, at the least, with the *Lublin* ruling that the doctrine "is not applicable * * * [to] projects involv[ing] the repair, extension, or relocation of existing facilities" (*ibid.*).[20] And as the Tenth Circuit said, in distinguishing construction of a multipurpose dam and reservoir project from decisions like *Murphey* v. *Reed:* " * * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. * * * It does not follow from the mere construc-

[20] The "new construction" doctrine had been judicially held inapplicable, prior to the 1949 Amendments, to "new construction" of buildings, machinery and facilities designed to replace, improve or enlarge existing production facilities in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (Nov. 25, 1946), approved by Congress, *infra*, p. 46.

All of the pre-1949 decisions relied upon by the Fifth Circuit below rested on the ground that solely "original construction," as distinguished from improvements, replacements and extensions of existing facilities, was involved (*e.g.*, *McDaniel* v. *Brown & Root*, 172 F. 2d 446, 471 (C.A. 10), on which the Fifth Circuit placed main reliance, specifically distinguished "work of repairing an existing building or facility or in constructing replacements of, or additions to, an existing building or facility"; similarly, *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3), specifically distinguished the type of "extension of current facilities" involved in the *McCrady* case; see also this Court's reference in *Vollmer* (349 U.S. at 430), distinguishing the construction work in *Murphey* v. *Reed*, 335 U.S. 865, from "work of improving existing facilities of interstate commerce").

tion of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable" (see *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, 336, certiorari denied, 345 U.S. 915). As in *Pennington-Winter*, there is no question here that the dam and reservoir project, by its mere construction, becomes unavoidably dedicated to the substantial functioning of interstate instrumentalities and interstate production facilities, and is so designed in size and location that it is certain not to be "dedicated solely for intrastate commerce."[n]

4. The Fifth Circuit's other assumption that the "production" phase of coverage is to be more narrowly construed, at least for construction cases, than the "in commerce" phase, is contrary to the previously settled view that "the phrase 'production for commerce' is 'obviously' more flexible and more inclusive than the phrase 'engaged in commerce.'" *Tobin* v. *Johnson*, 198 F. 2d 130, 133 (C.A. 8), certiorari denied, 345 U.S. 915, quoting from this Court's opinion in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 131; see also *Union Nat. Bank of Little Rock, Ark.* v. *Durkin*, 207 F. 2d 848, 852 (C.A. 8); *Tobin* v. *Girard Properties*,

[n] It seems quite likely that *Murphey* v. *Reed* was regarded as involving only the initial construction of buildings, barracks, mess halls, warehouses, recreation halls and similar installations appropriate for a temporary encampment, which might or might not be dedicated to interstate use, depending on the exigencies of war.

206 F. 2d 524, 526–527 (C.A. 5). See also *supra*, pp. 29–31. While the *Armour* decision antedated the 1949 Amendments to the "necessary"-to-production language,[22] it is clear that the amended language did not so narrow the previous scope of "production" coverage as to effect the result reached by the Fifth Circuit here—as has been recognized by the post-1949 decisions cited *supra*, and is evident from the legislative history of the amendment (discussed *infra*, pp. 44–46, 49–53).

Indeed, the Fifth Circuit itself, in its post-1949 *Girard* decision, *supra* (decided in August 1953, by a different panel) relied upon its "clear understanding that the courts have established a different and *much narrower standard for 'in commerce' coverage* than for 'production of goods for commerce' coverage," in holding employees not to be engaged "in commerce." In another post-1949 decision (*Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, June, 1958), it ruled that "[t]he differences between production of goods for commerce and the engaging in commerce are not such as to exclude the latter from the rationale of the Powell [*Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497] decision," referring to *Powell's* reliance on the "purpose of the Act * * *

[22] As amended by c. 736, 63 Stat. 910, Section 3(j), *infra*, p. 82, provides that an employee shall be deemed to have been engaged in the production of goods if [he] was employed in producing * * * [handling], transporting, or in any other manner working on such goods, or in any *closely related process or occupation directly essential* to the production thereof * * *" (emphasis added). Before the amendment the italicized words read: "process or occupation necessary."

not to regulate interstate commerce as such, but to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation" (256 F. 2d at 783).

As we have pointed out (*supra*, p. 29 *ff.*), the rationale of *Vollmer* and *Lublin, supra*, like that of *Powell*, goes to the coverage of the Act generally; it has no special relation to the "in commerce" branch, being based upon the express premises that the Act's coverage must be given a "liberal construction" and must be determined by "practical considerations, not by technical conceptions". (*Vollmer*, 349 U.S. at 429). The principle that the Act's coverage must be liberally construed is as true of one branch as for the other, and no plausible reason appears why "practical considerations," not "technical conceptions," should be the exclusive criteria of determination in one branch, but not in the other. Specifically, there is nothing in the statutory text, or the legislative history, or the factual context relating to the two branches, to exclude from the Act's coverage the improvement and enlargement of facilities directly and vitally related to the "production" of goods for commerce while including such improvement and enlargement of facilities similarly related and essential to engagement "in commerce."

Moreover, the legislative history of the 1949 amendment to the "production" language clearly contradicts the premise of the decision below that the amendment radically narrowed the scope of "production" coverage in relation to "in commerce" coverage. As stated by the chairman of the House Committee:

"The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942, October 18, 1949). Similarly, the Statement of the Majority of the Senate Conferees pointed out that the language was not intended to substantially change or limit the decisions construing the prior "necessary"-to-production language, but rather to "provide more certainty in this field," and specifically stated that the amended language "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). "This [amendatory] language," the Senate report continued, "is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous" and "contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods" (*ibid.*). These general statements of legislative purpose, as is more fully indicated *infra* (pp. 49–53), were supplemented by a detailed list of specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language.

In particular, the Senate report confirms the view of the Eighth and Tenth Circuits in the *Chambers* cases, *supra,* that the work of improving facilities for production of goods, by extensions or replacement, "falls in the same category" as repair and maintenance and is covered by the Act (*cf.* the reasoning of *Vollmer and Lublin, supra,* p. 36). See also *infra,* pp. 49–53. In its specification of (95 Cong. Rec. 14874) "typical * * * classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended," the Senate report included:

> 2. Employees repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods" [95 Cong. Rec. 14875; emphasis added],

without differentiating repair and maintenance from construction of improvements and enlargements, and specifically citing with approval not only such maintenance and repair work decisions as *Kirschbaum, Borden,* and *Roland, supra,* but also *Walling* v. *McCrady Const. Co.,* 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, in which coverage of employees engaged in the construction of extensive new buildings, machinery and facilities, designed to improve, enlarge or replace existing production facilities, had been upheld. The 1949 Congress thus indicated that the "new construction" doctrine was not to apply to improvement or enlargement of existing facilities.

AUTHORITATIVE JUDICIAL AND CONGRESSIONAL MATERIALS CONFIRM THE ACT'S COVERAGE OF THIS CONSTRUCTION WORK

Putting aside the erroneous view that the "new construction" doctrine supplies a special rule for this case, it is clear that coverage is supported by the prior judicial and legislative holdings, both because this construction is "closely related" and "directly essential" to the production of goods for commerce, and also because it involves the actual production of goods themselves in the primary sense.

1. Under the authorities, the work is "closely related" and "directly essential" to the production of goods for commerce

(*a*). There is no dispute that, if respondent's construction employees were merely engaged in the maintenance and repair of the pre-existing facilities of the Corpus Christi water system, they would be within the Act's coverage. For it has long been settled by a consistent line of decisions, both before and after the 1949 Amendments, that employees engaged in repair and maintenance of the facilities and equipment of a utility company supplying essential fuel, power, *water,* etc. to interstate instrumentalities and interstate producers are engaged in "production of goods for commerce," within the secondary meaning of Section 3(j). See, in particular, *McComb* v. *Farmers Reservoir & Irrigation Co.,* 167 F. 2d 911 (C.A. 10) (upholding coverage of employees engaged in maintenance and repair of the reservoirs and canals of an irrigation company supplying water essential to the growing of sugar beets, corn and peas, for eventual interstate shipment after being refined or canned, re-

spectively, by sugar refineries and canneries within the same State), affirmed with modifications including clerical workers, 337 U.S. 755;[23] *Reynolds* v. *Salt River Valley Water Users Ass'n,* 143 F. 2d 863 (C.A. 9), certiorari denied, 323 U.S. 764 (same holding with respect to repair and maintenance employees of equipment of irrigation company supplying water for growing of crops intended for shipment in interstate commerce); *Meeker Cooperative Light & Power Ass'n* v. *Phillips,* 158 F. 2d 698, 699 (C.A. 8), affirming and explicitly approving the district court's holding of coverage of construction workers engaged in repair and maintenance and "new construction" of electric lines for a rural electric cooperative which furnished a relatively small proportion of its power supply, but regularly, to some creameries, hatcheries and other pro-

[23] This Court, in affirming, stated that the Court of Appeals had "quite properly" applied the "close and immediate tie" standard of the *Kirschbaum*, *Armour* and *Roland* decisions (*i.e.*, the standard explicitly approved by Congress at the time of the enactment of the 1949 Amendments, see *supra*, pp. 44–46) to hold that the field employees were "engaged in an occupation necessary, in the statutory sense, for the production of agricultural commodities shipped in commerce" (337 U.S. at 759), and that indeed the word "'[n]ecessary' understates the case," since "[t]he water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production * * *. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the company's field employees in providing water for irrigation" (*id.* at 759). The Court then further held that this ruling was "equally applicable to the bookkeeper" since "his work is a necessary part of the operation of the company's water supply system," so that it "follows that his case is on all fours with that of the field workers" (*id.* at 770).

ducers some of whose products were eventually shipped out of the State (see 63 F. Supp. 733 at 739).[24]

(*b*). That the 1949 amendment to Section 3(j) was not intended to limit this well-settled area of coverage

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[24] See also *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751, 753 (C.A. 5) (holding that guards employed to protect the property of an electric company, among whose customers were interstate instrumentalities and establishments manufacturing and mining goods for shipment outside the State, were "just as vital to the interstate activities of defendant's customers as the repair of electrical motors was to the employer in the *Roland Electric Co.* case [*Roland Co.* v. *Walling*, 326 U.S. 657]"; *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6) (employees, including those engaged in maintaining or guarding the equipment, of a coal company furnishing substantial quantities of coal to concerns for use in the manufacture of goods for commerce, held covered).

Accord: *Mitchell* v. *Mercer Water Co.*, 208 F. 2d 900 (C.A. 3); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F. 2d 236 (C.A. 1); *Williams* v. *Wisconsin Electric Power Co.* (employees engaged in "construction, maintenance, repair and servicing" of power company's generating plants and other facilities), 3 W.H. Cases 750; 9 Labor Cases, para. 62,033 (not officially reported) (Cir. Ct. Wisc. 1943); *Larsen* v. *Dakota County Electric Co-op.* (employees engaged in "construction, extension, maintenance and repair of defendant's electrical power lines"), 7 W.H. Cases 229; 13 Labor Cases, para. 63,989 (not officially reported) (D. Minn. 1947); *Allen* v. *Arizona Power Corp.* (line and gas main repair and maintenance men), 4 W.H. Cases 355; 7 Labor Cases, para. 61,959 (not officially reported) (D. Ariz. 1943); *Phillips* v. *Anoka County Co-op Light Assn.* (outside maintenance men), 7 W.H. Cases 9; 12 Labor Cases, para. 63,577 (not officially reported) (D. Minn. 1947); *Richardson* v. *Delaware Housing Assn.* (guard protecting generating equipment) 3 W.H. Cases 278; 7 Labor Cases, para. 61,583 (not officially reported) (S.D. Fla. 1943); *Armstrong* v. *United Illuminating Co.* (guard), 7 W.H. Cases 109; 13 Labor Cases, para. 63,881 (not officially reported) (Sup. Ct. Conn. 1947).

was explicitly made clear in the comments explaining the purpose of that amendment. Not only did the Conferees' reports in both Houses expressly state, in direct contradiction to the assumption of the court below, that the legislative purpose was *not* substantially to change or limit the decisions construing the prior "necessary"-to-production language (see *supra*, pp. 44–46), but the specific decisions most pertinent to the instant case were affirmatively approved. Thus, the Senate report, in a detailed list of "typical" employees "performing tasks necessary to effective productive operations of the producer," who would remain within the Act's coverage, not only included employees engaged in "[p]roducing and supplying fuel, power, *water*, or other goods for customers using such goods in the production of different goods for interstate commerce," but approved specifically the above cited decisions in the *Reynolds, Meeker Cooperative, Lewis,* and *West Kentucky Coal Co.* cases (95 Cong. Rec. 14874–75; emphasis added).[*] See also the House Managers' report, which, while not so detailed regarding the extent to which prior judicial interpretation of "production" coverage would remain intact, also confirms the limited nature of the change, expressly stating that the amendatory language would "not affect the coverage

[*] In addition to the specific legislative approval of the *Reynolds* decision, the Congressional acceptance of the coverage rulings in both *Reynolds* and *Farmers Reservoir* (*supra*, pp. 47–48) was clearly indicated by its enactment in the 1949 Amendments of a special, carefully limited, exemption for employees "employed * * * in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways * * * which are *used exclusively for supply and storing of water for agricultural purposes*" (Section 13(a)(6); emphasis added).

* * * of employees who repair or maintain buildings in which goods are produced for commerce" (citing *Kirschbaum*), or employees "who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" or "employees of public utilities, furnishing gas, electricity *or water* to firms within the State engaged in manufacturing, producing, or mining goods for commerce," all of whom "will remain subject to the act" as "doing work that is closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14929).

The specific affirmation by both the Senate and House reports that employees of independent electric, gas and *water* utility companies, and of independent producers of "tools, dies, designs, patterns, machinery * * * or other equipment used by purchaser in producing goods for interstate commerce" would remain "covered as closely related and directly essential to such production" (95 Cong. Rec. 14874–75, 14929) contradicts the Fifth Circuit's view that Congress intended to expand the class of non-covered "local enterprises" (R. 96) so as to exclude from the Act's coverage work plainly designed to furnish equipment or facilities needed and used by producers of goods for commerce directly in their productive processes.[26]

[26] In particular, it is clear that Congress did not intend to expand the "local enterprise" concept of *Callus* (see *infra*, pp. 53–56) so as to exclude from the Act the wide variety of businesses which regularly supply essential utilities and materials to (among miscellaneous other customers) interstate instrumentalities and producers of goods for interstate com-

As we have said, from any practical and realistic viewpoint, the construction of adequate water supply facilities designed to replace and improve, without interruption of service, the water supply currently and substantially devoted to furnishing the water admittedly essential to and used directly in the productive processes of producers of goods for commerce, can hardly be regarded as any more "local" or "isolated" and "remote" from such production than the local manufacture and sale of tools, machinery

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merce. This is evident from the explicit statement that employees of utility companies and of suppliers of tools and materials, etc. would remain within the Act's coverage (see *supra*, p. 51), and from the specific approval of such decisions as: *Roland*, *supra*, p. 46, (an independent electrical contracting company serving, *inter alia*, 33 industrial customers—out of a total of approximately 1,000—who were engaged in interstate commerce or the production of goods for commerce); *Lewis* v. *Florida Power & Light Co.*, *supra*, p. 50, (an electric company regularly furnishing a relatively small proportion of its electricity for use in operating railroad signal lights and airport beacons); *Meeker Cooperative Light & Power Company Ass'n*, *supra*, p. 50, (a power company among whose regular customers were some interstate instrumentalities and interstate producers), *West Kentucky Coal Co.*, *supra*, p. 50, (a coal company among whose customers were some interstate producers). See also *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5), and other "ice company" cases (cited with approval in this Court's *Alstate* decision, 345 U.S. at 16, n. 4)—supplying ice, *inter alia*, to fruit shippers and railroads for refrigerating freight cars; *Tobin* v. *Johnson*, 198 F. 2d 130 (C.A. 8), certiorari denied, 345 U.S. 915 (an independent materialman regularly supplying some of its crushed stone and other materials for use in repair and maintenance of roads).

In all of these cases, coverage has been sustained by reason of the fact that among the general miscellany of customers were some interstate instrumentalities and interstate producers who had regular and substantial need for such utilities or materials.

or other equipment designed for similar use in the productive processes."

(*c*). The Fifth Circuit's reliance on *10 East 40th St. Co.* v. *Callus*, 325 U.S. 578, reflects its misapprehension of the legislative intent—probably resulting from its erroneous view that "[r]eference need not be made to Committee reports or other aids by way of legislative history" to determine "the class of employees to be considered engaged in local enterprises"

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[27] The situation here bears little resemblance to the examples of "local enterprise" cited by Congress to illustrate activities which would *not* be covered under the changed language of the 1949 amendment to Section 3(j). See the examples cited in the Senate report—*i.e.*, "the procurement of land for a new factory or the manufacture of brick for its buildings," or "employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce" (as distinguished from "employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production," which, it was expressly stated, would remain covered) (95 Cong. Rec. 14874). It is evident that the amendatory language was viewed by the Majority Senate Conferees simply as a measure to counteract the fears or possibility that it "might be argued" that coverage extended to such "remote or tenuous situations," since "[t]he definition in the present act provides no clear cut-off preventing *extension* of the coverage of the Act" to such extremes (*ibid.*; emphasis added).

The House Conferees' examples of situations to be excluded from coverage, although somewhat less "remote or tenuous" than the Senate examples, are, also, clearly distinguishable (having considerably less direct and vital relationship to the interstate manufacturer's processes) from the circumstances of the instant case—*i.e.*, "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer * * * engaged in producing goods for in-

(R. 96).[25] The employer there was the owner and operator of a rental building, in which office space was leased to a miscellany of tenants for administrative and clerical non-manufacturing activities. In ruling that the building maintenance employees in these circumstances were not covered by the Act, the Court emphasized that this enterprise was exclusively on of "[r]unning an office building," and that the happenstance that "some proportion of the offices in the building may, for the time being, be [the administrative or sales] offices of manufacturing enterprises" engaged in physical production of goods elsewhere—*in other buildings not maintained by the activities of the employees in question or their employer*—had too remote and "attenuated" a relationship to such tenants' production of goods for commerce to modify the "local" nature of the business (325 U.S. at 581, 583). Significantly, the Court expressly reaffirmed both *Kirschbaum, supra,* and *Borden Company* v. *Borella*, 325 U.S. 679 (decided the same day as *Callus*), which made it clear that maintenance work on a building that provides tenants with space needed for

terstate commerce," and a similar "local exterminator service firm" or "local architectural firm," employes of "a local window-cleaning company" such as were held covered in *Martino* v. *Michigan Window Cleaning Company*, 327 U.S. 173, and of "a local fertilizer company" such as were held covered in *McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824 (C.A. 1). (95 Cong. Rec. 14929.)

[25] The importance of the legislative history in construing this Act and its amendments has been repeatedly emphasized by this Court. See *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290; *Alstate Construction Co.*, v. *Durkin*, 345 U.S. 13; *Mitchell* v. *King Packing Co.*, 350 U.S. 260; *Steiner* v. *Mitchell*, 350 U.S. 247; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027.

their physical manufacturing operations is "production" within the Act. Thus, *Callus* would be applicable here only if the industrial users of water in Corpus Christi were limited to some administrative offices of producers who did all their manufacturing and processing elsewhere. This is, of course, very far from the fact (*supra,* pp. 24–28, 51–52).[29]

It is not difficult, of course, as a matter of abstract logic, to subdivide any relationship of cause and effect into a series of intermediate steps by making finer conceptual analyses. But the fallacy of inferring "close[ness]" or "remoteness" by a process of "dialectical progression"[30] (counting the "step[s] physically removed," see opinion below, R. 98) is well demonstrated by *Borden, supra,* one of the decisions specifically approved by Congress at the time of the 1949 Amendments. A main argument of Borden was that the maintenance employees of the New York building

[29] In marked contrast to the instant case, there was no evidence in *Callus* that the maintenance of the building had any direct or essential or regular relationship to the functioning of any particular interstate instrumentalities or interstate production. And, even on the "thin" evidence in *Callus*, the Court found the question of coverage to be a very close one (the decision being by a closely divided Court).

Clearly, respondent Zachry's business as a whole, in contrast to the *Callus* enterprise, cannot qualify as a "local enterprise," by any stretch of the imagination, since the bulk of its work (over 96% during the past three years of a total of 178 jobs, and almost 85% of a total dollar volume of over $77 million) is concededly of an interstate character subject to the Fair Labor Standards Act, including highways, railroads and power lines, as well as water systems (R. 90–91; Gov't. Exh. I—Answer to Interrogatories VIII).

[30] See the opinion of Judge Learned Hand in *Borella* v. *Borden*, 145 F. 2d 63, 64–65, affirmed, 325 U.S. 679.

were too remote from production of goods for commerce because their activities related only to the administrative and clerical employees and therefore they were "twice removed" from production (see Pet. Br. in No. 688, October Term 1944, p. 11). This Court, rejecting that argument, ruled that, in the practical "economic sense," since Borden's "operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production," these maintenance employees "stand in the same relation to this production as did the maintenance workers in the *Kirschbaum case*" (325 U.S. at 683, 684). At the practical economic level, the significant fact in the instant case is that the construction of the dam directly brings into being the accumulation of water essential to the efficiency and continuity of production by the industrial enterprises served by the Corpus Christi water system. In the absence of the dam, there would not be water in the quantities "direly needed" for the current and rising level of industrial, as well as domestic, requirements. This is *the* "practical consideration" for which this important dam was built.[31]

(*d*). In the proceedings below, and in its brief in opposition to the petition for certiorari, respondent contended also that the construction here was too remote as "a matter of geography" and as "a matter of contractual connections" (Brief in Opp., p. 12).

[31] At the time of the 1949 Amendments, neither the Senate nor the House reports made any reference to the *Callus* decision, and there is clearly no indication that Congress intended to use *Callus* as a mandate to broaden the class of "excepted occupations." See *supra*, pp. 51, 53, fns. 26, 27.

These are clearly irrelevant "technical conceptions." The fact that the water flows 42 miles through the mains before it reaches the city, on which respondent bases its theory of "remoteness" by "distance" (Brief in Opp., pp. 12–16), has of course no practical bearing on the relationship of the activities in question to the production of goods for commerce. The dam, we may assume, is no further out than was found necessary to supply an amount of water sufficient for the city's needs. If local industrial and topographical conditions combine to require a 42-mile water line from source to customer, then the beginning of that water line cannot be considered remote in any pertinent sense. That the geographical distance of the activity from the production of goods for commerce (see Brief in Opp., p. 12) is no criterion of the Act's coverage was long ago settled by *Borden, supra,* upholding the coverage of maintenance employees in Borden's New York central office building (although considerably more "geographically divorced from the manufacturing plants," 325 U.S. at 681) by reason of the relationship of the management and administrative services furnished from the New York office to the physical production carried on in the various distant Borden plants, throughout the United States and Canada.

Moreover, regardless of the length of the existing water line which will connect the enlarged reservoir with the industrial plants, the essential fact is that the work was performed at hardly any distance from the facilities which now serve the plants and which are to

be expanded or replaced as a result of the work. The new dam, as has been noted, is some 1400 feet downstream from the existing dam and the reservoir; and the new reservoir is designed to inundate the older facilities without interruption of service to consumers (see the Statement, *supra*, p. 5).[32]

Respondent's theory of remoteness in "contractual connection" between respondent's employees and the industrial consumers of the water (Brief in Opp., p. 13), although urged below, was so clearly untenable that it was not relied on by the Court of Appeals. Respondent ignores the settled principle that coverage under the Fair Labor Standards Act is determined not by the way in which the employer carries on his business, but by the character of the employees' activities. See *Kirschbaum, Vollmer* and *Lublin, supra*. As is evident from these and many other decisions, the essentiality or closeness of the employees' operations to production for commerce does not depend on contractual relationships of their employers, but on the functional realities. The employer in *Vollmer* was an independent contractor under contract to construct only portions of the guide levees which could not become part of the waterway until other guide levees and the dredging of the canal had been completed by other contractors, and clearly Vollmer had no contractual or business relationship with the users of the

[32] See also the Fifth Circuit's recognition of the irrelevance of "remoteness in distance" in decisions dealing with "in commerce" construction projects (*supra*, pp. 38–39).

canal; nor did the Lublin company have any closer "contractual connection" with the users of the roads, airfields, etc., constructed by other independent contractors pursuant to Lublin's plans and specifications.[33]

The irrelevance of such "contractual connection" was expressly recognized in the legislative reports on the 1949 Amendments, which, after listing the employees whose work would remain covered by the amended language (see *supra*, pp. 46, 50–51), added explicitly: *"whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer"* (Senate Conferees' report, 95 Cong. Rec. 14875; emphasis added)—*"notwithstanding they are employed by an independent employer* performing such work on behalf of the manufacturer, mining company, or other

[33] Similarly, *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, involved employees of an independent contractor constructing new abutments under two railroad bridges upon which the railroad itself subsequently lowered the tracks; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10) certiorari denied, 345 U.S. 915, involved employees of an independent contractor performing reservoir clearance work preliminary to work performed by other contractors who would subsequently construct and place into operation a new multiple-purpose dam; *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, involved employees of an independent contractor constructing foundations for new facilities to be erected by other contractors; and *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C.A. 4), involved an employee constructing a bridge which would be connected with the highway by a road to be constructed by another contractor.

producer for commerce" (House report, 95 Cong. Rec. 14929; emphasis added).[34]

2. Since the construction work actually produces (impounds) the water for uses essential to the functioning of interstate instrumentalities, it is direct production of "goods" "for commerce"

The statement of the Court of Appeals that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (R. 93) ignores the practical engineering fact that the very construction of the dam project impounds or "produces" the water ("goods"),[35] just as

[34] It is also irrelevant that respondent's contract is with the Water District and not with the City, which is the agency that sells the water to the consumers. The supply of water is a public responsibility in the area of Corpus Christi. How this responsibility is divided among the public bodies in the area is a matter of political and administrative convenience having no bearing upon the practical functional relation of the construction activities at the Mathis Dam to the production activities of manufacturers in the city. *Cf. Durkin* v. *McCrary Co.*, 206 F. 2d 277 (C.A. 5).

[35] That water (no less than road materials, ice, coal, oil, or other fuel) is "goods" within the meaning of the Act is not open to doubt. See *Farmers Reservoir, Reynolds* v. *Salt River* and *Mercer Water Company*, *supra*, pp. 47–49. The legislative history of the 1949 Amendments confirms this beyond question, as well as the Act's continued coverage of employees of such water producers. Thus the Senate Conferees' report on the amendments specifically states that the amended Section 3(j) would cover employees "[p]roducing and supplying fuel, power, *water, or other goods* for customers using *such goods* in the production of different goods for interstate commerce" (95 Cong. Rec. 14875; emphasis added); and similarly the House report specifically states that "employees of public utilities, furnishing gas, electricity or *water* to firms * * * engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act" (95 Cong. Rec. 14929; emphasis added).

coal, natural gas and oil are captured or "produced" by digging or drilling. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42, 44 (C.A. 5), affirmed, 317 U.S. 88, 91.[35] The *Warren-Bradshaw* operations bear a striking resemblance to those here. Both have to do with the capture of a product of nature. There it was oil. Here it is water. As this Court observed in that case, "Oil is obtained only by piercing the earth's surface" (317 U.S. at 91). While water may be obtained in more than one way, it is usually obtained by constructing a dam and reservoir. The connection, therefore, between the construction of a dam and reservoir and the capture of water precisely parallels the connection between well-drilling activities and the capture of oil. Thus, if the construction employees here were not actually producing the water,

[35] The Fifth Circuit there held that the operator of a rotary drilling rig and the members of his crew, who performed the preliminary drilling of holes short of oil producing sand, "if not engaged in mining for and the production of oil, within the meaning of the act, *as actually mining and producing the oil, and we think they were,* were certainly engaged in processes or occupations necessary to the production of oil" (124 F. 2d at p. 44; emphasis added). This Court, in affirming, ruled that "[w]hether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining—*and we certainly are not to be understood as intimating that they may not*—recognition of the obvious requires us to hold that, *at the very least,* they were engaged in a 'process or occupation necessary to the production' of oil," *since "those activities certainly bear as 'close and immediate tie' to production as did the services of the building maintenance workers held within the Act in Kirschbaum Co.* v. *Walling* * * * " (317 U.S. at p. 91; emphasis added).

"recognition of the obvious," as in *Warren-Bradshaw,* requires the holding that "at the very least" their work meets the "close and immediate tie" test of *Kirschbaum* (see *supra,* fn. 36), which Congress expressly adopted at the time of the enactment of the 1949 Amendments (see *supra,* pp. 45–46).

Since this construction work was designed to supply water essential to the functioning of interstate instrumentalities, the workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for use in construction of interstate highway improvements in *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, affirmed *sub nom. Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C.A. 5), and the other decisions cited with approval in *Alstate, id.* at 16, fn. 4). If the production of materials for use within the same state in the maintenance of stationary roads and railroad tracks is production of goods "for commerce," *a fortiori* production of water for use in the maintenance and operation of trucks and railroad cars, which themselves move across state lines, is production of goods "for commerce."

3. Some of the water may reasonably be expected to move interstate as an "ingredient" of products shipped in interstate commerce, or in use in the interstate operation of transportation facilities

The correctness of the view that construction work of the type here involved is production of goods for

commerce, within this Act's coverage, is confirmed by the further consideration—not pressed, and therefore not ruled upon, in either court below—that some of the water impounded by the construction of the dam actually moves interstate in its use in the operation of railroads or trucks, or becomes an "ingredient" of products moving in interstate commerce, and, therefore, the construction workers are engaged directly in producing "goods" for interstate transportation or shipment.[37]

As pointed out in our petition for a writ of certiorari (p. 24, fn. 16).

> * * * the District Court found that water impounded by the dam would become an "ingredient" of goods moving in interstate commerce. This finding was apparently based upon judicial notice of the water content of products manufactured by various industries in Corpus Christi. Since the Government did not undertake to present evidence that the water became an ingredient of any products [or that the water itself was transported across state lines], this was not urged below as a ground for coverage, and the trial court's final opinion, at the close of the trial on the merits, made no reference to the "ingredient" point. The Court of Appeals, in reversing the District Court's holding of coverage, clearly gave no consideration at all to the "ingredient" point [or to the point that the water itself moved interstate].

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[37] The statutory definition of "commerce" includes "transportation [and] transmission * * * between any State and any place outside thereof." Section 3(b), *infra*, p. 82.

The statutory definition of "goods" includes "any part or ingredient thereof". Section 3(i), *infra*, p. 82.

> While this ground for coverage has not hitherto been pressed in this case, we believe that the evidence in this record, supplemented by facts of common knowledge or authoritative publications properly subject to judicial notice, would make reliance upon this ground of coverage appropriate; if certiorari is granted we shall develop the point.

We deem it appropriate to advance this additional ground of coverage because the decision in this case will serve as the controlling precedent in determining coverage of employment in similar construction work to enlarge water supply facilities, which (as pointed out in the petition for certiorari (pp. 25–26)) is of considerable current and increasing importance throughout the Nation, as the fast-growing use of water by industries, utilities, and the increasing population, expands (see *supra*, p. 28, fn. 10). Inasmuch as it is a matter of common or readily ascertained knowledge that most water-supply systems for industrialized cities regularly furnish substantial amounts of water for use in the interstate operation of interstate instrumentalities (*e.g.*, railroads, trucks, ships, airplanes, etc.), and for use as an important ingredient of products shipped interstate (as well as for uses in manufacturing processes), resolution of the general coverage issue presented by this case should not, we submit, preclude consideration of this additional basis for sustaining coverage of water-system construction work.

The record here, although not developed to show the actual interstate movement of any of the water, does

show that the water system regularly supplies water to interstate railroads and trucking concerns, and "large quantities" to the major industries in the area "practically all" of which produce products for interstate sale, and that one of the major industries is production of chemicals (R. 33–37). Information in standard trade publications shows that, among the chemicals produced in Corpus Christi are caustic soda and sulphuric acid (see Directory of Texas Manufacturers, University of Texas, 1959, pp. 127–129) both of which utilize water as raw material in their manufacture. Both chemicals, moreover, are commonly shipped in solution with water, which, in the case of caustic soda, frequently comprises 50 percent of the shipped product (Glover & Cornell, The Development of American Industries, 3d ed. (Prentice-Hall), p. 427; 1 Encyclopedia of Chemical Technology, pp. 408–428; 13 Encyclopedia of Chemical Technology, pp. 458–497). The manufacture of paint, another Corpus Christi industry (see Columbia Lippincott Gazetteer of the World, *supra*), also uses water as an ingredient, twenty-five percent or more of the composition of latex and emulsion paints consisting of water (9 Encyclopedia of Chemical Technology, pp. 795–802; Payne, Organic Coating Technology (John Wiley & Sons, Inc.), pp. 372–377). In addition, several Corpus Christi concerns produce concrete (see Directory of Texas Manufacturers, *supra*), a product adaptable to a great variety of construction uses, including roads, bridges, docks and buildings (5 Encyclopedia Britannica (1959), pp. 112), and which contains water, generally comprising from 15 to 20 percent of total volume

(*Design and Control of Concrete Mixtures*, Portland Cement Association (Tenth Edition), p. 3).[**]

II

THE DISTRICT COURT'S LIMITATION OF THE INJUNCTION TO THE VIRTUALLY COMPLETED MATHIS DAM PROJECT WAS NOT WARRANTED

Although the Court of Appeals did not reach the issue presented by the Secretary's cross-appeal to that court (R. 78)—*i.e.*, whether the trial court erred in limiting injunctive relief to the single construction project which led to the institution of this suit, rather than granting an injunction restraining future violations by respondent on other projects within the Act's coverage—this question will necessarily arise if the decision below is reversed on the coverage question. This is also an issue of general importance in the

[**] Since the evidence relating to this ground of coverage was not developed in the record of the instant case, but has been fully developed in the record in the *Healy* case, *supra* (presently pending on appeal to the Seventh Circuit, No. 12777), the *Healy* record affords a more representative picture of the substantial quantities of water moving interstate as an "ingredient" of various industrial products shipped interstate, or in the course of its use by interstate instrumentalities. That record shows, for example: that railroads use large quantities of water in the boilers and tenders of steam-driven locomotives and in the cooler systems and steam generators of diesel locomotives, as well as for supplying passenger and dining cars (Healy R. 43–48); that railroads use considerable quantities of ice for freight car refrigeration and passenger train air conditioning (*id.* 34–35); that water is a substantial ingredient of many chemical products (comprising as much as 80% of some finished chemical products) (*id.* 21–23); that it comprises over 95% of beer products (*id.* 32–33); and from 25% to 30% of some paints and varnishes (*id.* 28–29).

enforcement of the Fair Labor Standards Act, and particularly in the region within the jurisdiction of the Fifth Circuit where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required.

While the grant or denial of injunctive relief under Section 17 of the Act, *infra*, p. 83, is a matter within the sound discretion of the district court, clearly this discretion is not unlimited. It must be a "legal discretion, not merely the individual view or will of the particular chancellor" (see *Union Tool Co.* v. *Wilson*, 259 U.S. 107, 112; *Winchester Repeating Arms Co.* v. *Olmsted*, 203 Fed. 493, 494 (C.A. 7)), and where the requested relief is warranted by conceded or indisputable facts it must be granted "absent any recognized mitigating factor." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 422; *Walling* v. *National Ice & Fuel Corp.*, 158 F. 2d 28 (C.A. 7).

This much has been recognized, as a matter of established general principles of equity, by most of the Courts of Appeals, and, accordingly, there have been a number of decisions reversing denials, and directing the issuance, of injunctions in cases under this Act.[39]

[39] *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325 (C.A. 8); *Tobin* v. *Anthony-Williams Mfg. Co.*, 196 F. 2d 547, 551 (C.A. 8); *Tobin* v. *Johnson*, 198 F. 2d 130 (C.A. 8), certiorari denied, 345 U.S. 915; and *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C.A. 8); *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8); *Lenroot* v. *Kemp*, 153 F. 2d 153, 156 (C.A. 5); *Mitchell* v. *Hausman, d/b/a Alice Meat Co.*, 261 F. 2d 778 (C.A. 5); *Walling* v. *National Ice & Fuel Corp.*, 158 F. 2d 28 (C.A. 7); *Walling* v. *Panther Creek Mines*, 148 F. 2d 604 (C.A. 7); *Mitchell* v. *Hertzke*, 234 F. 2d 183, 188–189 (C.A. 10); and *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C.A. 10).

However, as is illustrated by the District Court's action in the instant case, there has been considerable misapprehension of the kind of "mitigating factor[s]" which warrant the denial of injunctive relief. The standards relied upon and factors most frequently emphasized (by lower courts in the Fifth Circuit, particularly) to justify denial of injunctive relief have ignored or minimized the specific enforcement purposes the Section 17 remedy is designed to serve—to the point of seriously obstructing, rather than aiding, enforcement of the Act. It has become evident that, if the injunction remedy provided by Section 17 is to serve rather than thwart the national policies and objectives of this Act, there is a need for guiding standards which require that the emphasis be placed on the interests of the public and of the underpaid employees and complying competitors, rather than misplaced on over-solicitude for the non-complying employer who has already benefited financially from past violations and is in a position to gain similar benefits from future noncompliance while contesting and litigating other cases.

The District Court in the instant case, citing the Fifth Circuit's decisions in *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380, and *Mitchell* v. *Bland*, 241 F. 2d 808, limited its injunction to the virtually completed Mathis Dam project (thus, in effect, denying any real relief). Despite respondent's past violations on other projects (see *infra*, p. 80, fn. 50), and despite the absence of any indication that respondent would make amends for its "good faith" mistakes by restoring to

employees the substantial amounts of underpayments on the project here in issue, the District Court declined to grant an injunction restraining future violations on the grounds that respondent "has acted in good faith" in "an honest belief * * * that the project was not covered" and the court did not feel that respondent should "act at his peril" in connection with future projects (R. 76). These reasons were evidently premised on the standards announced by the Fifth Circuit in *Hodges* and *Bland, supra,* that a Section 17 injunction imposes "substantial disadvantages" on the employer "without, at the same time, giving the enforcement agency any real substantial benefit", and that "right to challenge substantial questions of coverage ought to be freely open to good faith litigation by an employer unfettered, in that process by the prospect of contempt proceedings" (238 F. 2d at 383).

In our view, this approach to enforcement of the Fair Labor Standards Act is quite wrong. As this Court pointed out in *United States* v. *Darby,* 312 U.S. 100, 122, the Fair Labor Standards Act is "directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair,' as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce." Suppression of the particular type of unfair competition at which this Act is directed is peculiarly dependent upon the injunction remedy. One of the most difficult practical problems of enforcing the Act is to assure complying employers, particularly those in the highly competi-

tive industries, that their less law-abiding or less conscientious competitors will not secure or retain substantial competitive advantages by periodic or sporadic failure to pay the wages required by the statute. The injunction remedy is the only effective means of preventing a noncomplying employer from retaining permanently the financial profit and unfair competitive advantage accruing from his noncompliance. For, unlike the ordinary equitable injunction or the anti-trust injunction, the ordinary injunction remedy under this Act cannot restore the *status quo* or require "divestiture of * * * unlawfully acquired" benefits (see *Schine Theatres* v. *United States*, 334 U.S. 110, 128). This is so because Section 17, as amended in 1949, expressly deprives the courts of jurisdiction to order restitution of past unpaid wages as an incident to the original issuance of an injunction.[40] Restitution of unpaid wages can now be ordered only by way of civil contempt proceedings for violations occurring *after* an injunction has been issued. Thus, as long as a noncomplying employer is not under injunction, there is open to him the opportunity of retaining permanently the financial advantage accruing from his noncompliance, with the consequent continuing temptation to resume noncompliance and to litigate even on the most tenuous grounds.

While thus serving as the most substantial and effective enforcement measure, the continuing injunc-

[40] The power to require back pay in contempt orders was not affected by the enactment of the proviso in 1949. *Frost-Arnett Co.* v. *Tobin*, 264 F. 2d 246 (C.A. 6); *Durkin* v. *Casa Baldrich, Inc.*, 111 F. Supp. 71, 75 (D. Puerto Rico) (setting forth the legislative history on this point), affirmed, 214 F. 2d 703 (C.A. 1).

tion under this Act is a particularly mild one so far as the enjoined employer is concerned. As the Eighth Circuit recently pointed out, "[s]uch injunction imposes no new restrictions upon the employers as it forbids only what is already forbidden by statute" (*Mitchell* v. *Southwest Engineering Co., supra,* 271 F. 2d at 432). It imposes no penalties for the violations found, not even requiring restoration of the wages determined to have been unlawfully withheld. It requires no payments in the future other than the minimum wages and overtime compensation that must be paid by all employers subject to the Act. Presumably, these were the considerations which prompted this Court to remark, in *Lublin, supra,* that "[w]e fail to see what undue burden will be placed on respondent by the issuance of an injunction * * *" (358 U.S. at 214).

The plain fact is that the continuing injunction imposes no real disadvantage on an employer with good faith intentions to comply in the future. It serves as a warning order that the court will be in a position to order restoration of underpayments resulting from *future* violations. If such violations are unintentional, the employer is not subject to criminal or punitive contempt proceedings, and in civil contempt proceedings he is as free to contest controversial issues of coverage or charges of violations as he would be in an original injunction action. The "prospect of contempt proceedings," as a practical matter, implies no more (except in cases of willful or criminal violations) than that the enjoined employer will not again have the opportunity to retain unlawfully acquired ad-

vantages at the expense of his employees and of complying competitors. If this is a burden or a "peril," it is one which an employer with a past record of violations and extensive litigation should be required to assume. The very purpose of the injunction remedy, after violations of the Act have occurred, is to place upon the employer "the risk of crossing the forbidden line" *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, at 192, 193), and thus relieve the Secretary and the courts of some of the burden and expense of repeated enforcement proceedings against prior offenders.

The Act regulates the weekly wage payments of a vast number of employees in hundreds of thousands of establishments throughout the land. It is physically and financially impossible for government investigators to inspect more than a very small percentage of the establishments covered by the Act in any one year; and an establishment once inspected may not see an investigator again for years. The resistant employer is thus in a position to evade compliance by backsliding between investigations or by shifting to new ground, however untenable, with relative safety due to the normal reluctance of employees to litigate against their employer while working for him,[41] the short two-year statute of limitations,[42] the difficulty of

[41] Under Sections 16 (b) and (c), employee suits can be brought only by or on the express request of the individual employees who, so long as they are still on the payroll, are dependent upon him for continued employment and for favorable conditions of employment. See *Holden* v. *Hardy*, 169 U.S. 366, 397; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 394; and *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 706–708.

[42] 61 Stat. 84, 87, Section 6, U.S.C. 255.

establishing wilfulness in criminal proceedings,[43] and the unavailability of back-pay orders in actions for an injunction. Only by a prohibitively costly program of constant surveillance can such employers be held to compliance, except to the extent that the limited prospective sanctions of an injunction can be obtained.

This case is an excellent illustration of how overemphasis on the supposed "disadvantages" which an injunction entails for the employer can frustrate the Act's enforcement to the detriment of employees and complying competitors. At the time this action was brought, the Mathis Dam was nearing completion, but it still had a few months to run. Therefore, since there was no reason to believe that respondent had come into compliance following the investigation which uncovered its noncompliance, the Secretary moved for a preliminary injunction. Respondent objected to the issuance of a preliminary injunction on the ground that it would require respondent to pay its employees in accordance with the Act until the case could be heard on the merits, and that respondent might never be able to recover such payments if it should prevail on the coverage issue (R. 9).[44] Al-

[43] See *Brooklyn Bank* v. *O'Neil*, *supra*, 324 U.S. at 709.

[44] This is no defense to a preliminary injunction under the Act. A court of equity has the power and resources for making the necessary "adjustment and reconciliation bet een the public interest and private needs as well as between competing private claims" (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330). The difference between the wages which respondent was paying and the wages which a preliminary injunction would have required it to pay could have been set aside in a special fund or paid into the registry of the court, for return to respondent if it should ultimately prevail, or for distribution to the employees if the Government should prevail.

though the trial court then expressed its conviction that the employees were covered and that it could "not see what additional evidence can be brought forward upon the merits" (R. 46–47), it declined to issue a preliminary injunction on the ground that there was "no pressing need" for it since respondent "is a good, solvent company" (R. 20) "fully able to respond to any judgment" (R. 47). So respondent continued its noncompliance, without any provision having been made to enable the court later to require compliance even for the period subsequent to its announced belief that coverage existed.[45] By the time of the final hearing, the project was virtually completed and the accumulated wage deficiencies, estimated by the Government investigator to be in excess of $70,000 (R. 20) and conceded by respondent to be about $50,000 (R. 66), remained unpaid.

In these circumstances, the injunction issued ultimately by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project. Such a short-lived decree is only minimally useful as an enforcement measure in the future; and its effect is to "give

[45] Respondent continued to rely on its self-serving belief that the work was not covered. When questioned about its continued noncompliance after the trial court had clearly stated its views that the Act applied on the Mathis Dam project, the treasurer testified that he thought "it was a tentative opinion" (R. 62), and Mr. Zachry stated that it was his "understanding that there was no firm decision" (R. 66).

tremendous impetus to the program of experimentation with disobedience of the law," which this Court has condemned (*Jacksonville Paper Co., supra,* 336 U.S. at 192)."

The construction industry is "highly competitive," and labor costs are an important factor in bidding on and obtaining contracts (R. 65). The work, moreover, is necessarily discontinuous and is always divided into projects which move toward completion while investigative procedures and administrative efforts to effect compliance run their normal course. Thus, both the temptation to experiment with disobedience and the opportunity to profit from it are especially inherent in the construction industry. Consequently, to limit injunctions in this industry to the particular projects which have been the subject of litigation, is in practical effect to exempt the industry from the enforcement procedures of Section 17. It is, therefore, particularly true in the construction industry that limited injunctions "operate to prevent accountability for persistent" violations, and that court decrees of adequate generality are "necessary to prevent further violations where a proclivity for unlawful conduct has been shown" (*Jacksonville Paper Co.,* 336 U.S. at 192). As this Court observed in *Carpenters Union* v. *Labor Board,* 341 U.S. 707,

---

" In a recent case in Louisiana, the employer frankly admitted that he was fully aware of the applicability of the Act but had decided that it was a worthwhile risk, like "any other business risk," if he could get by for about two years before enforcement could catch up with him. *Mitchell* v. *Airlines Foods, Inc.* (Civil Action No. 6322, E.D. La.).

715, in holding that a restraining order was not foreclosed by the completion of the construction project which gave rise to the litigation, the challenged practices may be merely "a sample of what might be repeated elsewhere if not prohibited."[47]

In declining to grant adequate relief in this case, the trial court relied primarily upon its finding that respondent had "acted in good faith" (R. 76). The only support in the record for this finding is respondent's self-serving and uncorroborated assertion of reliance upon advice of counsel,[48] a stock excuse for noncompliance in the region within the jurisdiction of the Fifth Circuit. That court's *Hodges* decision, we believe, has encouraged increased resort to this justi-

[47] Since 1946, respondent has bid on and had awarded to it various types of construction contracts, including highways, railroads, power lines, and water systems and it "intends in the future to continue to bid on and perform such contracts as are awarded to it" (R. 90).

[48] Although respondent's president testified that its legal department had issued a written opinion on the project in question, the written opinion was not offered in evidence. Since the opinion was within respondent's possession and control, and since there was no other support for respondent's claim of reliance on counsel, it may reasonably be inferred that the letter was of doubtful corroborative value to respondent's position. *Cf. Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310, 315 (C.A. 8).

In respondent's New Mexico case, where it claimed reliance upon an opinion issued by the Solicitor of Labor, it did produce the opinion, but, as the court there found, it did not support Zachry's position on the work in question (a pavement job for the improvement of the existing airfield at Holloman Air Force Base) since it dealt with an entirely different factual situation. See *Mitchell* v. *H. B. Zachry Company*, 127 F. Supp. 377, 383–384.

fication, and the Labor Department has so advised that court on several occasions, urging modification of the standards there announced so as to counteract the impetus that decision gives to reliance on lax and superficial advice. The Department urged this in the instant case, in *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781, and in the recently decided *Blanchard* case (*Mitchell* v. *Blanchard*, decided December 14, 1959, not yet reported, but found in 14 W.H. Cases 378).

The Fifth Circuit, however, still accepts the "advice of counsel" excuse, although in the recent *Blanchard* case the court did state (*id.*, at 380) that it may not be "a safe harbor in every storm." We submit that it should never be regarded as a "safe harbor," so far as past violations of this Act are concerned, except in "storms" where there is some substantial "recognized mitigating factor," such as an offer to make restitution, which is the only reliable test of genuine good faith. For it is evident that the availability of advice of counsel as an excuse for noncompliance leaves it open to the employer to elicit advice of "no coverage" without fully and accurately disclosing to counsel the relevant facts, and that it does nothing to encourage enterprising inquiry by counsel into the facts or thoughtful consideration by him of the controlling law. A non-complying employer could, without perjury, testify to "reliance on advice of counsel," after telephoning his attorney, and receiving an off-the-cuff opinion that on the facts as stated in the conversation, and under the attorney's casual recollection of applicable principles the Act did not apply.

Although the trial court itself was convinced of coverage in the instant case, it thought that there might be "room for an honest belief by defendant that the project was not covered" (R. 76). But an honest mistake as to coverage or the fact "[t]hat a study of the law * * * might have revealed uncertainties in it" is not, standing alone, sufficient to bar injunctive relief. *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d at 431; *Chambers Construction Co.* v. *Mitchell, supra,* 233 F. 2d at 725. As pointed out by this Court in *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, in rejecting the employer's contention that he should not be subjected to the payment of liquidated damages because his noncompliance was due to the complexities of determining the exemption status of the employee, "Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee" (316 U.S. at 583). This statement, made with respect to liquidated damages for past violations, would seem to be at least equally applicable to the injunction remedy which imposes no hardship upon the employer for past violations, but looks only to the future. Paraphrasing this Court's language in *Jacksonville Paper, supra,* "where as here the aim is remedial and not punitive there can be no complaint that the burden of any uncertainty * * * is on respondents' [employers'] shoulders" (336 U.S. at 193).

A non-complying employer has, of course, the unquestioned right to litigate questions of coverage. But, as the Eighth Circuit has recognized, his in-

sistence on immunity to the point of litigation, when proved to be unwarranted, may itself be a ground for an injunction to free the administrative authorities from the necessity of litigating *de novo* if repetition should occur. See *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 770 (C.A. 8); see also the Eighth Circuit's *Chambers* decision, *supra*, 233 F. 2d at 725.

Here, however, the trial court has permitted respondent to shift the entire burden to its employees. As has been noted, the amount withheld from them (up to the time of the preliminary hearing) was at least $50,000, as estimated by respondent itself (R. 66), and much of this accumulated while respondent was litigating and resisting administrative enforcement. It is thus evident that respondent by its assertion of doubt as to coverage, whether made in good faith or not, has secured for itself a substantial bonus, as well as a highly strategic competitive advantage against its competitors in bidding for the project. If, in addition to retaining this advantage, respondent comes out of this litigation subject only to an injunction on a now-completed project, then it remains free to attempt to acquire a similar advantage by repeating the process.[49] A judgment which envisages this

[49] See, *e.g.*, *Castle* v. *Walling*, 153 F. 2d 923 (C.A. 5), in which a second equity suit had to be brought against an employer for renewed deficiencies in wages after an injunction had been denied in the first suit "because [the employer] impressed the court with his honest and bona fide intentions to comply with the Act" (*id.*, at 926). In the circumstances, the court in the second case was limited to an admonitory injunction against a third occurrence.

result, we submit, is not within the bounds of the reasonable exercise of discretion by a court of equity.

Such a judgment fails to deter repetition of violations by removing the greatest practical incentive for noncompliance, *i.e.*, the retention of financial advantages accruing from the violation. It disregards the disadvantages of the burden and expense imposed upon the enforcement agency by repeated investigations and litigation. It disregards the substantial disadvantages to the employees whose enjoyment of their rights is left open to indefinite deferment if the employer should again develop doubts as to some aspect of the Act's application, as well as the disadvantages to law-observing firms who must compete with non-complying firms. These disadvantages to the Government, to the employees, and to law-abiding competitors far outweigh any possible disadvantage to the employer.[50] We submit that where, as here, there have been repeated violations and extensive litigation, employers should be required to assume the "burden of any uncertainty" in their future operations, and this Court, we respectfully suggest, should so declare.

---

[50] Moreover, the violations found by the trial court were not the first in respondent's history. Respondent was found to have underpaid its employees in violation of the Act in *Mitchell* v. *Zachry Co.*, 127 F. Supp. 377, in 1955; and has been in difficulties short of litigation on several other occasions. However, the trial court expressly stated that the fact that there had been a total of eight investigations and two lawsuits since 1941 "doesn't mean anything to me" (R. 58).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded to the trial court with directions to enter the injunction prayed for in the complaint.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*) are as follows:

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly

essential to the production thereof, in any State.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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FILED
FEB 15 1952
JOHN T. DOWLING, Clerk

No. 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner

vs.

H. B. ZACHRY COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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No. 83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

vs.

H. B. ZACHRY COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

The statements in Petitioner's Brief concerning the opinions below and the jurisdiction of this Court are correct.

QUESTION PRESENTED

This is a Fair Labor Standards Act case which involves the question of coverage of employees of Respondent who constructed what is known as the Mathis Dam.[1] Unlike Petitioner, Respondent will

[1] The official name of the dam is the Wesley E. Seale Dam, but it is commonly known as the Mathis Dam, and both Petitioner and Respondent are referring to it by the latter name, as they have done throughout this litigation.

not seek to color the statement of the question in the case by any further recital of facts at this juncture.

In general terms, the question in the case is:

> Were Respondent's employees, while building the dam, engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

Under the controlling definition in the Act, Respondent's employees can be deemed to have been engaged "in the production of goods for commerce" only if they worked in a process or occupation "closely related" and "directly essential" to the actual physical manufacturing of such goods.

Hence, when consideration is had for the whole of the Act, the precise question in this case is:

> Were Respondent's employees, while building the dam, employed in a process or occupation *closely related* and *directly essential* to the actual physical production of goods for commerce?

If this Court determines that the activities of Respondent's employees were not "closely related" and "directly essential" to the production of such goods, the decision of the Court of Appeals for the Fifth Circuit was correct and should be affirmed. Contrariwise, if this Court finds that close relationship and direct essentiality were present, the Court undoubtedly will reverse the decision of the Court of Appeals and affirm that of the District Court.

Although the District Court found coverage, it exercised its discretion under Section 17 of the Act and issued an injunction applicable only to the Mathis Dam project, denying Petitioner's application for a blanket injunction. Petitioner assigned such denial on his cross-appeal to the Court of Appeals. Because of that Court's holding of no coverage, Petitioner's cross-appeal was not decided below, but Petitioner is now urging the point before this Court as a second question in this case (P. Br. 3). Since the District Court, in the exercise of its discretion, decided the point adversely to Petitioner, and since the Court of Appeals did not reach the question, Respondent is unable to see how the matter is a proper one for consideration or decision by this Court. However, in an endeavor to meet Petitioner squarely on all points presented in his Brief, regardless of their substantiality, Respondent will discuss the scope of the injunction near the end hereof.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201 *et seq.)* are as follows:

> "Sec. 7(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce *or in the production of goods for commerce* for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a

rate not less than one and one-half times the regular rate at which he is employed.[2]

"Sec. 3. As used in this Act—

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *closely related* process or occupation *directly essential* to the production thereof, in any State."

REGULATIONS INVOLVED

Part 776, Tit. 29, Labor c. V, Wage and Hour Division, Department of Labor, Sections 776.0 to 776.30 of the Code of Federal Regulations, as amended (3 CCH L.L.R., par. 24,102), provides, *inter alia*:[3]

"776.20(b). The Act's definitions do not, however, include as 'goods' such things as *dams*, river improvements, highways and viaducts, or railroad lines.

"776.17(a). The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope

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[2] Absent an accompanying statement to the contrary, all italics herein have been added.

[3] These and other portions of the regulations are set forth in greater detail in the Appendix *infra*.

of its coverage with respect to employees (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on' goods for commerce. Some employees whose work might meet the 'necessary' test are now outside the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production. . . .

"776.17(b). The terms 'closely related' and 'directly essential,' are not susceptible of precise definition. . . . Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to production meet the 'closely related' test. . . .

"776.17(c). (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words 'directly essential' refer only to the relationship of the employee's *work* to production. Work 'directly essential' to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear on the other hand, that the criteria for determining whether a process or occupation is 'closely related' to production cannot be limited to those which show its closeness in terms of need or function. It may be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the *place* or the

time of its performance, or in terms of the *purposes* with which the activity is performed by the particular employer through the employee, or in terms of relative *directness* or *indirectness* of the activity's effect in relation to such production, or in terms of employment *within* or *without* the productive enterprise.

"(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activitiy; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business. Moreover, in some cases where particular work 'directly essential' to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production.

'"No one of the factors listed above is necessarily controlling, and other factors may assume importance." (Italics copied rather than supplied.)

STATEMENT

Petitioner's statement of the facts is so intertwined with his argument that it would indeed be

difficult to divorce the two and reply only to his statement. Rather than attempt any such tedious task of extrication, Respondent submits herewith its own statement, which also contains argument.

This is not an "in commerce" case. Rather, it is a "production of goods for commerce" case. In his Complaint, Petitioner twice alleged only that Respondent's employees were "engaged in the production of goods for interstate commerce" (R. 4). Nowhere in his pleading or elsewhere in this lawsuit has Petitioner contended that such employees were "engaged in commerce." In finding coverage, the District Court recognized that Respondent's employees admittedly "are not engaged in the actual movement of commerce *or in connection with the instrumentalities of such movement*," and that such coverage must be found, if at all, in the above-quoted portions of the Act which pertain to "production of goods for commerce," and, more particularly, in those portions which require findings of activities in a "*closely related* process or occupation *directly essential* to the production" of goods for commerce (R. 72-73). Hence, to reiterate what is implicit in the foregoing statement of the question in this case, the facts herein must be viewed and analyzed with the constant goal of ascertaining whether there existed between the activities of Respondent's employees and the ultimate production of goods for commerce those requisites of *close relationship* and *direct essentiality* which are imposed by the Act.

At the outset, let us start with the definite and undisputed fact that various and sundry types of goods are produced for commerce in the City of

Corpus Christi by various and sundry manufacturing concerns in that City. Let us also start with the certain fact that the concerns which produce such goods for commerce use water in their manufacturing processes. Petitioner did not need to make copious citations of gazetteers and similar works in his brief in order to show that industries of this type are located in the City of Corpus Christi. Neither did he need to cite a book called "Design and Control of Concrete Mixtures" to demonstrate that concrete is composed of cement and water, nor a tome entitled "Organic Coating Technology" to prove that paints sometimes contain water. Respondent humbly admits the elementary facts concerning water which are thus so erudítely established by Petitioner's cited authorities.

In addition, it is a further admitted fact that most of the industries in the City of Corpus Christi which produce goods for commerce, and which use water in so doing, purchase such water from the City.

With these facts constituting one end of the picture, let us now look at the other end—the only end which involved Respondent and its employees.

In 1955, as a result of competitive bidding, Respondent was awarded a contract to construct the Mathis Dam (Pl. Ex. 7).

Respondent's contract to construct the Dam was not with the City of Corpus Christi, and Respondent had no contractual relationship whatever with the City. Rather, Respondent's sole contract was with

the Lower Nueces River Water Supply District (Pl. Ex. 7). That District is a governmental agency, a body politic and corporate," (Article 8280-134(14), Vernon's Annotated Civil Statutes of Texas) which is entirely separate and apart from the City of Corpus Christi. Unlike the situation which exists is some states wherein a water district is merely an *alter ego* of a city or town, the Lower Nueces River Water Supply District and the City of Corpus Christi are "separate governmental agencies" (R. 29). As stated by the District Court (R. 45), "the boundaries of the district are not co-extensive with the city's."

The District's status as an independent agency of the State of Texas, and the Act creating it, were upheld and confirmed by the Courts of that State in *Lower Nueces River Water District v. Cartwright*, 274 S. W. (2d) 199 (writ refused, n. r. e.).[4]

[4] For whatever collateral light it might shed upon the problem at hand, agencies such as the Lower Nueces River Water Supply District, although often referred to as "municipal corporations" in the statutes creating them (such as Article 8280-134 V.A.C.S., referred to above) are, nevertheless, in the language of the Supreme Court of Texas:

> "not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Willacy County Water Control and Improvement District No. 1 v. Abendroth*, 142 Tex. 320, 177 S. W. (2d) 936 (1944).

Holdings such as this have primary importance in the hornbook distinction between "governmental" and "proprietary" functions. Thus, under the decisions of the Courts of Texas, a city which constructs a reservoir or otherwise engages in the water business is performing a "proprietary" function which makes it subject to the application of

Pursuant to its statutory powers, the District entered into a contract with the City of Corpus Christi by which the District would build the Mathis Dam and would sell the water impounded thereby to the City (R. 25-27; Pl . Ex. 1).[5]

The Mathis Dam was built on the Nueces River, which is situated entirely within the State of Texas (R. 30). The Dam forms no part of any navigation or flood control project; it produces no hydro-electric energy (Pl. Ex. 7). No federal funds were used in its construction. Rather, the Dam is being paid for

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principles pertaining to municipal and other corporations, whereas an agency such as the Lower Nueces River Water Supply District which constructs a reservoir and sells water is performing a "governmental" function and the situation is the same as if the State of Texas itself were engaged in such activities. *Hodge v. Lower Colorado River Authority*, 163 S. W. (2d) 855 (writ dismissed). See also *Banker v. Jefferson County Water Control and Improvement District No. 1*, 277 S. W. (2d) 130 (writ refused, n.r.e.); *Karling v. Lower Colorado River Authority*, 303 S. W. (2d) 495 (writ refused, n.r.e.); *City of Wichita Falls v. Lipscomb*, 50 S. W. (2d) 867 (writ refused).

[5] Under an applicable statute (Article 7880-4a V.A.C.S.), the District is entitled to sell water according to the following priorities:

"1st. Domestic and municipal use;

"2nd. Industrial use, other than the development of hydro-electric power;

"3rd. Irrigation;

"4th. Development of hydro-electric power;

"5th. Pleasure and recreation."

The statute further provides that: "Where the welfare of the district may require, the directors of such district may withdraw water from an inferior use and appropriate such water to a superior use, as hereinabove given discretionary preference."

by ad valorem taxes on property located within the District and by revenues from the sale of water to the City (R. 29-30).

Prior to Respondent's construction of Mathis Dam, the District owned another dam on the Nueces River, which impounded water for use by the City and which is referred to in the record as the "old dam" (R. 27-28).

The Mathis Dam is located downstream from the old dam about 1,300 to 1,500 feet (R. 45). The relative positions of the two dams are depicted in the photograph which is Plaintiff's Exhibit 5 (R. 27). When the reservoir behind Mathis Dam is filled, the old dam "will be inundated by the new lake" (R. 28).

From these facts, it might be concluded that Mathis Dam is merely an "improvement or replacement" of the facilities of the old dam. On the other hand, the decision to locate Mathis Dam at its existing site was an engineering one dictated entirely by technical reports as to the suitability of the site from a geographical and topographical standpoint, and entirely unaffected by the fact that the old dam was a few hundred feet upstream (R. 30-31). Indeed, the presence of the old dam appears to have been a costly nuisance, since provision had to be made to provide diversions of water from it while Mathis Dam was being constructed, to remove the upper portions of its embankment, and to excavate a partial breach therein (Pl. Ex. 7). In other words,

a new dam, built by totally "new construction," undoubtedly would have been located at the same site as Mathis Dam, regardless of the presence of the old dam, and probably could have been more easily and less expensively constructed if the old dam had not presented an impediment upstream (R. 30-31).

Thus, as far as any question of "new construction" versus "improvement or replacement" is concerned, the District Judge was most perceptive when he said that Respondent's construction of Mathis Dam was (R. 46):

> "by all practical considerations, as distinguished by [sic] technical conceptions . . . at once an improvement, a rebuilding and a new construction."

Certain it is that, despite Petitioner's efforts to erect a straw man to the contrary (P. Br. 11-13), Respondent places no especial reliance upon any supposed doctrine that construction activities automatically are exempt from coverage under the Act simply because they involve "new construction." On the other hand, even more certain is the fact that Petitioner can obtain no solace, and should secure no judgment, by his attempt to persuade the Court that "improvement or replacement," rather than "new construction" is involved herein. Probably, as found by the District Court, new and old construction are both involved. Definitely, however, the adjective attached to such construction should not be determinative of the ultimate decision herein.

The water impounded by Mathis Dam is discharged below the dam into the bed of the Nueces River and flows some 26 miles downstream to a treatment plant at Calallen, Texas, owned by the City (R. 29). After being treated at Calallen, the water travels an additional 16 miles (for a total journey of 42 miles from the Dam) to a point where it enters the City's water distribution system (R. 29). Once the water enters such system, it is sold by the City to the same types of customers that are found in any large municipality.[6]

Included among the customers are industrial plants, some of which produce goods for commerce. Direct evidence was introduced as to only one such customer (R. 35-36), and to shorten the record it was agreed that the City makes similar sales of water to various other industrial plants located in and near the City. (R. 36). None of the City's customers sells the water itself in interstate commerce (R. 36). Rather, in the words of the District Judge, the water generally "is used for cooling towers and engines and so forth" (R. 39).

The goods produced for interstate commerce by these industrial plants located in or near Corpus Christi—some 42 miles distant from Mathis Dam—are the only "goods" involved in this case. If Respondent's employees are covered by the Act, it is be-

[6] The City classifies these customers as residential, commercial, seasonal, hospitals, schools, churches, city and industrial (R. 32).

cause their activities miles away from the actual production of the goods were nevertheless of such nature that this Court can say and hold that they were "*closely* related" and "*directly* essential" to goods produced in the Corpus Christi area which use water as an incident of their production. For reasons set forth in detail below, the requisites of close relationship and direct essentiality are wholly lacking.

With respect to Petitioner's plea that this Court override the action of the District Court and grant a blanket injunction against Respondent, the facts are also simple and convincing. Respondent has completed approximately 1,200 construction jobs of varying kinds, with varying problems of coverage. The value of these jobs has been "in excess of three hundred million dollars" (R. 63). Despite this volume of work and the manifold problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 63). At no time has Respondent ever been sued by an employee for any alleged violation of the Act. (R. 63-64).

Neither Respondent nor its legal staff treats lightly the matter of coverage under the Act. On the contrary, in a vast majority of cases its legal staff has advised Respondent that its employees were

covered. Figures immediately prior to trial of this case were as follows (R. 59-62):

Year	Total Jobs	Value	Under the Act	Not Under the Act	Percentage Under the Act
1956	78	$34,352,000	74	4	94.9%
1957	74	$20,000,000	73	1	98.6%
1958 (to trial)	33	$23,097,000	31	2	93.1%
Total	185	$77,449,000	178	7	96.2%

Thus, the Mathis Dam job does not fit into any pattern of non-compliance by Respondent, or of refusal to recognize coverage. Rather, it is merely one of the extremely few recent jobs (3.8% of the total, or 7 out of 185 jobs) in which Respondent and its legal staff have not concluded that coverage exists. As will hereinafter be demonstrated by discussion of the authorities, the District Court could well have denied any injunction at all, even while finding coverage; but, in the exercise of its discretion, it saw fit to grant a limited injunction. Respondent respectfully submits that this Court should not disturb the exercise of such discretion, regardless of its final determination of the matter of coverage.

SUMMARY OF ARGUMENT

I.

Respondent, like the Court of Appeals, fully recognizes that coverage thereunder should be "determined by practical considerations, not by technical conceptions." Hence, Respondent joins with Peti-

tioner in urging that this Court decide this case upon the basis of practical considerations; but, for reasons pointed out below, Respondent suggests that Petitioner pays only lip service to such rule of decision, and that the arguments advanced by Petitioner are in fact far more technical than practical.

II.

In building Mathis Dam, Respondent's employees were not actually producing any goods for commerce. As stated in the above-quoted Regulation issued by Petitioner's Wage and Hour Division, a dam is not "goods" within the meaning of the Act. Upon the asserted analogy afforded by *Warren-Bradshaw Drilling Co. v. Hall*, 124 F(2d) 42 (a case which Petitioner did not even deign to cite before the Court of Appeals), Petitioner appears before this Court with the belated argument that the water impounded by the Dam is "goods" and that Respondent's employees "produced" such water by building the Dam (P. Br. 18, 60-66). Even if this strained "technical conception" is taken of the term "production," the evidence is undisputed that the water itself is not sold in interstate commerce (R. 36). To counter the record on this point, Petitioner is attempting to bring in by the back door another belated contention to the effect that the water becomes an ingredient of goods which are themselves produced for commerce. This contention is advanced dehors the record, with Petitioner himself admitting (P. Br. 66, n. 38) that "the evidence relating to this ground of coverage was not developed in the record of the instant case."

Hence, the Court of Appeals was eminently correct in its opinion herein when it succinctly described the issues in this case as follows (R. 93):

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed 'in [a] closely related process or occupation directly essential to the production' of goods," *H. B. Zachry Co. v. Mitchell*, 262 F(2) 546 at 548-549.

III.

With Respondent's employees admittedly not being covered by the portions of the Act which refer to workers engaged "in commerce," it is pertinent to note the obvious fact that the "closely related" and "directly essential" requirements apply and delimit the scope of coverage only under the "production of goods for commerce" portions of the Act, and that no such statutory curtailment is placed upon coverage of those engaged "in commerce." Therefore, decisions pertaining to coverage of commerce itself, and of the instrumentalities thereof, must be applied with caution and discrimination in determining coverage of those engaged "in the production of goods for commerce," since the requisites

of close relationship and direct essentiality have been written by Congress into the latter type of determination, whereas no such statutory mandate attends the former.

IV.

1. Prior to 1949, the definition portion of the Act provided that employees were covered if they worked on the actual production of goods for commerce:

> "or in any process or occupation *necessary* to the production thereof, in any State."

2. In 1949, Congress deleted the "necessary" test and inserted the "closely related" and "directly essential" requisites which are now in the Act. In their statement, the House Managers who handled the Conference Committee report on the 1949 amendment made express reference to this change and stated that the intent of Congress in amending the definition was to narrow the coverage of the Act and to remove therefrom numerous local activities which had theretofore been ruled subject to the Act.[7] In the regulations quoted above, the Wage and Hour Division has also interpreted the 1949 amendment as being intended to narrow the scope of coverage in production for commerce cases. The amendment has been so construed by the Sixth Circuit in *Mitchell v. Moore*, 241 F(2d) 249, by the Tenth Circuit in *Juarez v. Kennecott Copper Corporation*, 225 F

[7] Pertinent portions of the House Managers' statement are set forth in the Appendix, *infra*.

(2d) 100, and by the Seventh Circuit in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, as well as by the Fifth Circuit in the case at bar.

3. As contained in the Act, the terms "closely related" and "directly essential" must mean something in the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. Even under the old "necessary" test, this Court recognized in *10 East 40th Street Bldg., Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1227, that:

> ". . . merely because an occupation is indispensable in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act . . . Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line."

Petitioner repeatedly tries to deprecate the application of the *Callus* case to a situation such as the one at bar, stating that the Fifth Circuit erred in following the reasoning of such case (P. Br. 16, 53-55). If the Fifth Circuit so erred, then the Sixth, Tenth and Seventh Circuits have likewise erred, since in the decisions last cited above each of those Courts leaned heavily upon the *Callus* case in deciding what was and was not "closely related" and "directly essential" to the production of goods for commerce.

4. In *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116, this Court said that the:

> "problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn."

While fixed points are lacking, numerous authorities lend aid in drawing the line, among which are:

(a) The legislative history of the 1949 amendment, including the Conference Committee report referred to above. In addition to repeated statements that the amendment was intended to narrow coverage, the report sets forth specific examples of prior decisions which in effect are overturned by the amendment. One such specific example is *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351. In that case, the employees quarried rock and transported it to a site where a dike was being constructed. The dike would serve as a dam and would prevent wells which produced oil for commerce from being flooded. The activities of the employees in that case were at least as essential and as related to the production of goods for commerce as were the activities of Respondent's employees in the instant case, yet the Conference Committe stated in plain words that the Labor Department and the courts would no longer be able to hold the Act applicable in cases where the facts were similar to those in the *Schroeder* case, because such activities are not closely related and directly essential to the production of goods for commerce. If a situation such as that in the *Schroeder* case is

no longer covered by the Act, then most certainly it should not be held that the instant situation is so covered.

(b). Another case which the Conference Committee said would no longer represent the law is *McComb v. Super-A Fertilizer Works*, 165 F(2d) 824, where coverage had been held for employees of a fertilizer company which sold all of its fertilizers to farmers for use in sugar cane fields, with the cane thereafter being processed into raw sugar and sold in commerce. Under the 1949 amendment, such a situation will no longer be covered. Is the casual connection between the work of Respondent's employees on Mathis Dam and the production of goods for commerce in Corpus Christi any less remote?

(c) Also akin is *Mitchell v. Moore*, 241 F. (2d) 249, where the employees were engaged in manufacturing and processing livestock and poultry feed which was fed to animals and fowls that were sold and shipped in commerce. With appreciation of the limiting effect of the 1949 amendment, the Court held that close relationship and direct essentiality were lacking and that the employees were not covered. If, as held by the Court, remoteness was there present, is there not like remoteness in the case at bar?

(d) The same observations can also be made with respect to the "hospital cases," *Juarez v. Kennecott Copper Corporation* 225 F(2d) 100, and *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, where the

providing of hospital and medical care for workers directly engaged in the actual production of goods was held too remote for coverage.

(e) Another aid in drawing the line is afforded by this Court's logic in the *Callus* case, and especially in the distinction which the Court there made between its holding in that case and its holdings in *Borden Co. v. Borella*, 326 U. S. 679, 65 S. Ct. 1223, and *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 116. In the latter two cases, coverage was found for employees in two buildings which were owned and occupied for the primary purpose of serving commerce. On the other hand, in the *Callus* case this Court held that coverage did not exist in the case of an office building used generally by a diverse number of tenants in various kinds of businesses, including a few whose businesses were related to commerce. In so holding, the Court said:

> ". . . an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

Precisely parallel reasoning is applicaple here. If Respondent had built a dam which was to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued

that Respondent's employees were covered since the dam, like the building in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce.

However, the Mathis Dam is not such a dam, for it was not designed primarily to furnish water for industries producing goods for commerce. Rather, it, like the office building in the *Callus* case, was intended to serve and does serve a miscellany of water customers — residental, commercial, institutional, and municipal, as well as industrial (R. 32). The Trial Judge aptly described the purpose of the Dam when he said (R. 33-34):

> "Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area . . . that is the advertised purpose, and we voted for it, to get an adequate water supply for this area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here."

To track and paraphrase this Court's language in the *Callus* case, a dam so intended for serving the usual miscellany of water users "has many differences in the practical affairs of life" from a dam intended to serve solely or primarily those engaged in the production of goods for commerce, "and the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

(f) Additional aids in drawing the line are afforded by the regulations of the Wage and Hour Division which are quoted above and are set forth in greater detail in the Appendix hereto. Among the factors there set forth as subjects for consideration in determining the relationship and essentiality of a particular activity are:

(i) Where, when and how the activity is performed in relation to the production to which it pertains.

(ii) Whether the activity is performed within or without the productive enterprise.

(iii) Whether its performance is with the primary view of aiding production or is for some different purpose.

(iv) How immediate or delayed is the activity's effect on production.

(v) The number and nature of any intervening operations or processes between the activity and the production.

(vi) And, in an appropriate case, the characteristics and purposes of the employer's business.

The effects of a consideration of these factors are obvious. In his brief, Petitioner has scoffed at Respondent's mention of the fact that the activities of the employees at Mathis Dam were 42 miles distant as a matter of geography, and several contracts distant as a matter of contractual connection, from the actual production of goods in Corpus Christi. According to Petitioner, these are "technical concep-

tions," deserving of no consideration (P. Br. 17-18, 56-60). In so arguing, Petitioner runs counter to his own regulations which say that "place" of performance of the activity is to be considered, and he also disregards this Court's statement in the *Callus* case that "'remoteness of a particular occupation from the physical process is a relevant factor in drawing the line." Most certainly remoteness in geography and in contractual connection are not decisive of this case, yet they are indeed relevant factors.

It will be most difficult for Petitioner to deny that each and every one of the above factors, contained and set forth in his own regulations, points to a decision of non-coverage in this case. Respondent is not in the business of producing goods for commerce; the activities of Respondent's employees were performed outside, rather than in, any productive enterprise. Such activities were not performed for the primary purpose of aiding industries which produce goods for commerce; rather, they were performed to aid in furnishing water to all residents of the Corpus Christi area, of which the producing industries form only a small segment. The activities had no immediate effect on the production of goods for commerce. Rather, such activities affect the production of goods only in the remote sense that, long after the activities were performed, production of goods is aided when a factory worker takes a drink of water or puts water in a boiler or cooling tower. Finally, there are indeed a large number of intervening operations or processes between the activities

performed by Respondent's employees and the eventual production of goods.

(g) All of these matters lead to one final consideration which is most practical and non-technical, to-wit: If remoteness is not present in the situation at bar, when, if at all, can remoteness—lack of close relationship and of direct essentiality—ever exist in a situation involving the supplying of water, some of which winds up being used by producers of goods for commerce? If coverage exists in this case, then in connection with the supplying of water the only non-covered activity seemingly would be the uttering of prayers for rain; and, if Petitioner's contentions in this case are sustained, his zeal may well come to encompass that activity.

As is said above, the terms "closely related" and "directly essential" must mean something with respect to the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. If Petitioner is correct in his contentions, then in connection with the supplying of water the entire casual chain is covered, and the terms so deliberately inserted into the Act by the 1949 amendment are rendered meaningless.

In this connection, it should not pass unnoticed that Petitioner seems to feel that some magic lies in the fact that water, rather than some other substance, is involved in this case. Is such a view practical, or is it not merely another of Petitioner's tech-

nical conceptions? Insofar as the tests of close relationship and direct essentiality are concerned, is water to be treated any differently than the feed involved in *Mitchell v. Moore* or the medical care involved in the hospital cases, *supra?* Does water stand in any higher status under the Act than feed or other substances? If these latter two questions are answered in the affirmative, as Petitioner would have this Court do, then such answers must be found other than in logic or in the terms of the Act itself.

V.

To analyze all of the dozens of cases cited by Petitioner would extend this brief unduly. Moreover, such case by case analysis is unnecessary, since in the main Petitioner relies upon *Mitchell v. C. W. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860; *Alstate Construction Co. v. Durkin*, 345 U. S. 13, 73 S. Ct. 565; and *Mitchell v. Lublin, McGaughy & Associates*, 358 U. S. 207, 79 S. Ct. 260, to carry his propositions. Respondent has no quarrel with those decisions, or with the principles enunciated therein.

At the outset of any analysis of these cases, note should be taken of the fact that all three are "in commerce" cases, rather than "production of goods for commerce" cases, *Vollmer* and *Lublin* being clearly so, and *Alstate* also being an "in commerce" case—a case involving an interstate highway—although production features were involved therein. To call these "in commerce" cases, as Respondent has done throughout this litigation, and as did the Fifth Circiut, is not to disparage them or to say that they are

wholly inapplicable to the case at bar. Contrary to the insinuations in Petitioner's Brief, neither Respondent nor the Fifth Circuit accorded the cases such cavalier treatment (P. Br. 9-10, 29-36).

Rather, Respondent has labelled *Vollmer*, *Alstate* and *Lublin* as "in commerce" cases for several reasons of clarity and convenience. As everyone realizes, the Act itself makes a distinction between "in commerce" situations and "production of goods" situations. Since the 1949 amendment, that distinction has been accentuated by the fact that the "closely related" and "directly essential" requirements were written into the law applicable to the latter type of situation, whereas no comparable language in the Act governs the former. In neither *Vollmer*, *Alstate* nor *Lublin*, therefore, did this Court pass upon, or have occasion to pass upon, the effect of the requirements of the 1949 amendment. With such being true, it cannot be accepted as gospel that whatever Petitioner or anyone else might read into this Court's rulings in those three "in commerce" cases must be, or should be, deemed applicable to production of goods cases generally or, in particular, to a production of goods case such as the one at bar in which need for interpretation and application of the "closely related" and "directly essential" tests is squarely before the Court.

Certainly, it would seem that the language in those cases concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all

types of cases arising under the Act, whether or not they are "in commerce" cases. Respondent has so accepted such language and has endeavored to analyze and submit this case in light thereof.

Certainly, also, full recognition must be had of this Court's holding in the *Vollmer* case and of its subsequent statement in the *Lublin* case concerning the supposed "new construction" doctrine. Perhaps when this Court referred in *Lublin* to "whatever vitality the 'new construction' doctrine retains after" *Vollmer* and *Gileo*,* it was merely softening the obsequies of a doctrine that is already wholly deceased. On the other hand, *Vollmer*, *Gileo* and *Lublin* were all "in commerce" cases, and in *Vollmer* the Court distinguished its holding therein from its earlier acceptance of the new construction doctrine in *Murphy v. Reed*, 355 U. S. 865, 69 S. Ct. 105, on the ground that the new construction work held exempt in the latter case was "not the improvement of a facility or instrumentality of interstate commerce."

Perhaps, therefore, this Court's rejection of the new construction doctrine applies only to cases "in commerce," and has no application to situations such as those in *Murphy v. Reed* and in the case at bar which do not involve the improvement of a facility or instrumentality of interstate commerce. In deciding the instant case, the Fifth Circuit so ruled, with an apparent eye to what this Court held in

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* *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 76 S. Ct. 952.

Murphy v. Reed and to what this Court said about such holding in the *Vollmer* case (R. 96-97). That Circuit's appraisal of those two cases was not without substance.

In any event, it seems foolish to speculate before the Bench of this Court as to what the Court might or might not have held in those cases, since this Court knows far better than counsel what it held and wherein, if at all, such holdings are pertinent to the "closely related" and "directly essential" tests to be employed in the case at bar.

The facts concerning the location of Mathis Dam and to its relationship to the "old dam" are undisputed and speak for themselves. Perhaps it is true, as Petitioner so vigorously argues in one of his several castigations of the Fifth Circuit, that calling the building of Mathis Dam "new construction" would avail Respondent naught. On the other hand, labelling the Dam an "improvement or replacement" also solves nothing, unless this case is to be decided by name tags rather than by practical considerations.

As is said above in Respondent's Statement, the District Judge probably was correct when he said that Mathis Dam is "at once an improvement, a rebuilding and a new construction." The problem at hand cannot be avoided or solved merely by affixing one or the other of those names to the Dam. Rather, the nature of the Dam and of its construction is significant only as it affords aid in determining

whether the requisites of "closely related" and "directly essential" exist. Since no such determination was required of the Court in *Vollmer*, *Alstate* and *Lublin*, it would appear that those decisions at most have only tangential bearing upon the instant case; but, except for this statement, Respondent will not undertake the presumptuous procedure of attempting to tell this Honorable Court what it held in those decisions and wherein, if at all, its holdings cut into the problem at hand.

VI.

In seeking certiorari, Petitioner asserted a conflict between the decision of the Fifth Circuit herein and the decisions of the Eighth and Tenth Circuits in the so-called *Chambers* cases; *Mitchell v. Chambers Construction Company*, 214 F(2d) 515, and *Chambers Construction Company v. Mitchell*, 233 F(2d) 717, and he continues to cite and rely heavily upon those cases in his brief. Neither of the *Chambers* cases should be deemed applicable or controlling herein.

In the first case, by the Eighth Circuit, the question of coverage was not decided and, while affirming on other grounds the refusal of the district court to grant an injunction, the Court merely said that it was "inclined to agree" with the Secretary's contentions on coverage.

In the second case, as stated by the Court of Appeals herein (R. 98), the Court "equated the new construction conception as to instrumentalities of

commerce . . . with construction of facilities to be used for production of goods, "without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities. In other words, that Court embraced Petitioner's contention that merely labelling something an "improvement or replacement" is enough to insure coverage, and that such a label suffices even though the case might be a production case rather than an "in commerce" one.

Moreover, the facts in the two *Chambers* cases are distinguishable from those at bar since both involved construction done on *water distribution systems*, rather than on facilities which result in the impounding of water that ultimately reaches a distribution system. As a result, the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of the City of Corpus Christi, and was even further removed from the delivery of water to industrial plants by the distribution systems. In addition, the construction contracts in those cases were with the cities which owned the distribution systems, and the work was directly performed for them, whereas in the instant case the construction contract was with the Nueces Water District, and the building of the dam for the District was only in an indirect sense work done on behalf of the City which owned the

distribution systems that in turn supplied the industrial plants.

VII.

With respect to Petitioner's plea that this Court override the District Court's exercise of discretion under Section 17 of the Act by granting against Respondent the blanket injunction which the District Court did not deem warranted, Respondent first calls attention to the facts set forth above which reflect how, in conducting its varied activities, Respondent has endeavored to comply with the Act, and how successfully it has done so. Additional facts of similar nature are set forth below, but at this juncture it appears necessary only to mention that the District Court expressly said and found (R. 76):

> "The court declines to enjoin defendant generally, *finding that defendant has acted in good faith* and that there was room for an honest belief by defendant that the project was not covered. The court does not feel that defendant should act at his peril in connection with all projects in the future."

With these statements and findings having full support in the evidence, surely, under the holding of this Court in *Lublin*, and under the holdings of lower courts in *Mitchell v. Bland*, 241 F. (2d) 808, *Mitchell v. Hodges Contracting Company*, 238 F. (2d) 380, and like cases, the District Court properly exercised its discretion under Section 17 of the Act, and such exercise should not be disturbed by this Court.

ARGUMENT

I.

The Act should be given a liberal construction, and this case should be decided upon the basis of practical considerations rather than technical conceptions. However, liberal construction of a statute does not involve its emasculation or a judicial re-writing thereof, and the test of using practical considerations rather than technical conceptions means nothing if the person espousing it pays only lip service thereto.

Respondent fully agrees with the statement by this Court in *Mitchell v C. W. Vollmer & Co.*, 349 U. S. 427, 75 S. Ct. 860, and in other cases, that the Fair Labor Standards Act is to be accorded a liberal construction. The Court for the Fifth Circuit expressly recognized such principle in its decision of this case (R. 93). However, with full recognition of the principle, that Court also said:

> ". . . we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress."

There is, of course, a significant difference between "liberal" construction and a "loose" construction wherein the language of a statute and the intent of those who enacted it, together with applicable canons, are thrown to the four winds in favor of a construction designed to accomplish that which the person construing it thinks it should have accomplished in the first place.

Respondent probably is not as charitable as was the Fifth Circuit, for it seems to Respondent that many of the arguments in Petitioner's Brief come perilously close to asking this Court to make a loose construction of the Act whereby it will be tortured to mean that which the Wage and Hour Division of the Department of Labor thinks it should mean, and whereby it will be treated as if it were written as that agency thinks it should have been written, rather than in the manner in which Congress saw fit to write it. Examples of such an approach by Petitioner to the problems in this case will be pointed out from time to time as the ensuing argument develops.

Certainly it is Respondent's belief that where the language of a federal statute is clear and unambiguous (as is the pertinent language in the instant case) and where the intent and purpose of Congress were plain (as they were here), the statute should be interpreted according to such language, intent and purpose, and should not be sabotaged or subverted to serve another purpose or to satisfy a supposed social policy.

In the instant case, for example, the basic provision of the Act, Section 7(a), provides:

> "Except as otherwise provided in this section no employer shall employ any of his employees who [a] is engaged in commerce, or [b] in the production of goods for commerce for a workweek longer than forty hours, unless [he receives specified overtime compensation]."

The [a] and [b] brackets were inserted in the above quotation to emphasize the obvious fact that, in originally writing the Act, Congress itself distinguished between two separate and distinct types of employees — those engaged *in commerce*, and those engaged *in the production of goods for commerce*. Perhaps, from the standpoint of abstract social policy or otherwise, Congress shouldn't have recognized these two situations and spoken in terms thereof. Perhaps Congress should have lumped together and treated alike all employees whose activities in any way touch commerce, top, side or bottom. However, regardless of what a theorist might think it should have done, the bald fact is that Congress saw fit to recognize and create the above two categories, and that it did so in clear and unambiguous language.

What, then, is to be done? Is a court or administrative agency to follow the statute and recognize the two types of situations, or is it to ignore them and seek to blot them out on the ground that Congress shouldn't have inserted them in the Act in the first place?

As will hereinafter be shown, in 1949 Congress amended the second category—the one dealing with employees engaged "in the production of goods for commerce"—by providing that coverage in that category should obtain under the Act only if two explicitly stated requirements were met. In so acting, Congress did not impose any such requirements with respect to employees in the "in commerce" category.

What should be done in this situation? Should the courts and administrative officials disregard the two types of situations on the ground that the two actually are only one and that Congress should not have declared otherwise? Should they shunt aside the 1949 amendment with the dubious rationalization that they have always interpreted both types of situations in the same manner which the amendment now requires them to treat the second one? In sum, either by disregarding the amendment or by recognizing it but treating it as unnecessary, should the courts and administrative officials read it out of the Act and also otherwise render meaningless the Act's express distinction between situations "in commerce" and those involving employees engaged "in the production of goods for commerce?"

It would almost seem as if such questions answer themselves in the mere asking thereof; yet, as will hereinafter be pointed out, Petitioner seemingly is unaware of the proper answers for he determinedly strives to obliterate or blur the distinctions between the two types of situations; he repeatedly insists upon reading into the "production" cases those holdings which this Court has made solely with reference to "in commerce" situations; and where, as in the case of the 1949 amendment, the Act itself requires different treatment of the two situations, Petitioner calls upon this Court to embrace a so-called "liberal construction" by which the amendment would be made nugatory and the two situations would be treated as one.

In addition, Petitioner repeatedly refers to this Court's oft-quoted statement that questions concern-

ing coverage under the Act should be determined upon the basis of practical considerations, rather than technical conceptions. Respondent fully agrees with this principle, but Respondent does not acquiesce in Petitioner's apparent belief that everything he argues is "practical," while everything that Respondent urges is "technical."

Is it "technical" to point out that the Act creates and recognizes the "in commerce" and the "production of goods for commerce" distinction? If such is technical, rather than practical, then the technicality is found in the Act itself, rather than in Respondent's arguments in connection therewith. The same may and should be said with respect to any argument that Respondent's insistence upon fulfillment of the language and intent of the 1949 amendment is "technical" and should therefore be cast aside.

If charges of technicality are to be urged, what is to be said of Petitioner's arguments that the supplying of water under the Act is to be treated differently from any other activity, or than the supplying of anything else, merely because water and not some other substance is involved? What also is to be said of Petitioner's argument and obvious belief that, if he can somehow avoid the label of "new construction" and can get this Court to tag Mathis Dam as an "improvement or replacement," a victory for him at the hands of this Court will surely follow?

Respondent is happy to join Petitioner in urging that this case be decided in an arena of practical

considerations, but Respondent experiences difficulty in perceiving the practicality of most of Petitioner's arguments, or in comprehending Petitioner's repeated charge that Respondent's contentions are mere technical conceptions.

In a case of this kind, it would appear to be somewhat practical, and certainly not unduly technical, to track the language of the Act and the purpose of Congress. Such is what Respondent has done, and proposes to continue doing, in presenting this case.

II. and III.

This is a "production of goods for commerce" case, rather than an "in commerce" case. Hence, it necessarily is governed by the portions of the Act which deal with employees "engaged in the production of goods for commerce" and with decisions construing such portions of the Act.

This is not an "in commerce" case; rather it is wholly an "in the production of goods for commerce" case. Petitioner himself has consistently recognized this in earlier stages of this litigation, since in Paragraphs IV and V of his Complaint (R. 4), he twice alleged only that Respondent's employees were "engaged in the production of goods for interstate commerce," and nowhere has Petitioner alleged or proved that, in building Mathis Dam, Respondent's employees were "in commerce."

The dam on which such employees worked crosses a local stream which is not a tributary to a navigable stream and which, therefore, does not affect

navigation as did the dam and reservoir in *Tobin v. Pennington-Winter Construction Co.*, 198 (F(2d) 334, *cert. denied*, 345 U. S. 915, 73 S. Ct. 494, a case cited and relied upon by Petitioner (P. Br. 42, 593).[9] The facts in that case revealed a comprehensive plan to improve navigation on the Arkansas and Mississippi Rivers, and such facts afford a clear example of "in commerce" activities. No such activities are involved in the case at bar.

Rather, as is stated above, this is purely a "production of goods for commerce" case. Both Courts below agreed upon that, even though they differed in their findings as to coverage (R. 72-73, 93). Respondent's employees actually produced nothing but a dam across a local stream, and it would appear eminently practical, rather than technical, to observe that the dam is stationary and does not move in commerce. Also, in Section 776.20(b) of its regulations, as quoted above, Petitioner's Wage and Hour Division recognized that "the Act's definitions do not, however, include as 'goods' such things as dams."

The portion of the Act which defines those persons who "produce" goods for commerce, Section 3(j), provides:[10]

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[9] The *Penington-Winters* case and *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351, are the only cases cited by the parties herein which involve construction activities on or in the vicinity of dams. The *Schroeder* case was briefly mentioned *supra* at p. 20, and both cases are discussed *infra* at pp. 53-54.

[10] Respondent has divided this quotation into two paragraphs for purposes of reference and of clarity. The statute itself contains no such dual paragraphing.

1. ". . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods,

2. "or in any *closely related* process or occupation *directly essential* to the production thereof, in any State."

Since Respondent's employees produced only a dam, and since a dam is not "goods" within the meaning of the Act, it would seem rather obvious that if the Act can possibly be said to comprehend Respondent's employees, it can do so only by virtue of the second paragraph of the above quotation, rather than under the first paragraph.

In earlier stages of this litigation, the statement just made was accepted and acquiesced in by Petitioner without challenge. However, since he has encountered an adverse decision below on the question of coverage, Petitioner has belatedly dredged up two more theories which he is now advancing, tentatively in his Petition for Certiorari (pp. 23-24), and with more temerity in his Brief (pp. 18-19, 60-66).

Upon the asserted analogy afforded by *Warren-Bradshaw Drilling Co. v. Hall*, 124 Fed (2d) 42 (a case which Petitioner did not even cite in the Courts below), Petitioner appears before this Court with the argument that, even though Respondent's employees were not producing goods when they built the dam (since the dam itself admittedly is not "goods")

yet the dam will impound water, some of which eventually will trickle down to industries which use it in producing goods for commerce. *Ergo* says Petitioner, Respondent's employees were actually producing "goods" for commerce after all, since they were producing water while they were building the dam.

After clearing this hurdle to his satisfaction, Petitioner follows with the averment that the "goods" so produced by Respondent's employees, i.e., water, were produced for commerce since, according to him, (1) some of the water so "produced" becomes an "ingredient" in the goods manufactured by those industries in the Corpus Christi area which admittedly produce for commerce; and, also according to Petitioner, (2) some of the water finds its way into trains or trucks which are actually "in commerce," with the result that the water itself is either "in commerce" or is a goods produced for "in commerce" activity under the holding in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 565.

The patent purpose of both of these arguments is to enable Petitioner to squirm out from under the tests of "closely related" and "directly essential" which are contained in the second paragraph of the above definition. In his "ingredient" argument, Petitioner is averring that Respondent's employees were in fact engaged in the *actual* production of goods (water) in commerce under the first paragraph of the above-quoted definition, rather than

being engaged in a related process or occupation under the second paragraph. By his "trains and trucks" argument, Petitioner is either trying to transmute this into an "in commerce" case (which would be utterly contrary to his pleadings in the case and to his prior theories thereof), or he is trying to say that the so-called production of the water is for "in commerce" purposes, and thus that the situation is subsumed under *Alstate*. In either event, Petitioner's purpose is, as stated above, to avoid the force of the tests of "closely related" and "directly essential" which are contained in the second paragraph of the above quoted definition.

Even the most ingenuous man on the street should have no difficulty in discerning that Petitioner's arguments in these respects are highly "technical" and are not at all "practical." In saying that one of Respondent's root-pickers who picked roots out of rocks destined for Mathis Dam was "producing goods (water) for commerce," is Petitioner not being somewhat less practical and considerably more technical than if he faced the facts and frankly conceded that such a worker was, at the very most, only engaged in a "process or occupation" related in a remote degree to the production of goods in the industrial plants in the Corpus Christi area. In interpreting the facts of this case, as well as in reading the Act, there should be no inhibitions against the use of common sense.

The record is undisputed that none of the water impounded by the dam is sold in commerce.[11] More-

[11] The entire record on this point is as follows (R. 36-37):

over, as far as Petitioner's "ingredient" theory is concerned, the whole of the testimony is set forth in a footnote below.[12] As the quotations in the footnote reveal, the District Judge stated that so far as he knew water does not become a part of industrial products in the Corpus Christi area; the sole witness on the subject said likewise; and counsel for Petitioner added an assenting quip. If a decision in this

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COUNSEL FOR RESPONDENT: "Your Honor, further than that, we don't know of any industries who sell water outside of the State, the water itself.

COUNSEL FOR PETITIONER: "We don't contend that."

[12] To support his contention concerning use of water as an ingredient, Petitioner twice cites (18, 62) a terse collateral remark made by the trial court in its initial order denying the preliminary injunction, which order, of course, is not the final judgment here under review.

The "ingredient" matter, and the District Court's understanding of same, can best be reflected by quoting verbatim the *only* part of the record in which such matter was even alluded to. The lone witness who testified how water is used by industrial plants around Corpus Christi was asked whether it is used in connection with cooling and condensation towers. After such question, the following colloquy ensued (R. 36):

THE COURT: "It [the water] is not part of the product, it is used for cooling towers and so forth.

COUNSEL FOR RESPONDENT: "So far as I know, none of them are part of the product, but—

THE COURT: *"So far as I know, none of them are. Do you know of any that water is part of their product?*

THE WITNESS: *"No, sir.*

THE COURT: *"Any appreciable part of the product?*

THE WITNESS: *"No, sir.*

COUNSEL FOR PETITIONER: "I am sure they try to keep it out of their petroleum products."

case is to be confined to the record herein, and if it is not to be assumed that the District Judge took judicial knowledge of that which he himself said he didn't know, then the record itself should be sufficient to dispose of Petitioner's ingredient theory."[13]

Petitioner's theory that the water actually became a part of an "in commerce" movement is deserving of no greater consideration. As is said above, the water impounded by Mathis Dam admittedly is never sold in interstate commerce (R. 36-37). If, nevertheless, the water is deemed to have been "in comerce" because of the holding in the *Alstate* case, apt indeed are the remarks of Justices Douglas and Frankfurter in that case that "the circle" of coverage has become "amazingly large." As is hereafter shown, the facts pertaining to any alleged production of water by Respondent's employees for use "in commerce" are far more remote than the facts involved in *Alstate*. Long prior to the 1949 amendment hereinafter referred to, this Court said and held in *McLeod v. Threlkeld*, 319 U.S. 491 at 497, 63 S. Ct. 1248 at 1251, that:

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[13] Petitioner admits that "the evidence relating to this ground of coverage was not developed in the record of the instant case" (P. Br. 66, fn. 38), but he states that such a record was developed in a pending Illinois case, and he blithely refers this Court to that record for reference, excerpting therefrom (*id.*). Certainly the precepts of Blackstone, Marshall and other giants of our jurisprudence have not so far faded that Respondent should be called upon to account for a record in an Illinois case which it had no hand in preparing and the contents of which are utterly unknown to it.

> "The test under this present act, to determine whether an employee is engaged *in commerce* is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or *so closely related to the movement of the commerce as to be part of it.*"

Hence, regardless of whether the test of *McLeod v. Threlkeld* or the tests of the 1949 amendment are employed to measure the nexus between the activities of Respondent's employees and commerce, the requisite tie is lacking and this is true even if the distinction between "in commerce" and "production of goods for commerce" situations is wholly blurred, as Petitioner seeks to do.

In his brief, Petitioner undertakes to flush so many hares from the brush at the same time, and to scurry them in so many divergent directions, that it is difficult to shoot at one without yielding to the temptation to aim at others. In the foregoing comments, Respondent has digressed to make mention of Petitioner's belated "ingredient" and "trains and trucks" arguments; but, getting back on target, Respondent now once again reiterates its belief that the Court of Appeals for the Fifth Circuit was eminently correct when it pinpointed the issues in this case as follows (R. 93):

> "The Secretary concedes that the construction workers were not engaged 'in commerce.' If, therefore, his views are to prevail it must be on the basis of their being engaged 'in the production of goods for commerce.' Since obviously

> they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed 'in [a] closely related process or occupation directly essential to the production' of goods," *H. B. Zachry Co. v. Mitchell* 262 F(2d) 546 at 548-549.

Hence, Respondent will now focus attention upon the "closely related" and "directly essential" tests of the Act.

IV.

The activities of Respondent's employees in building Mathis Dam were not "closely related" and "directly essential" to the production of goods for commerce. Therefore, the activities of such employees were not covered by the Act.

Prior to 1949, the definition portion of the Act provided that employees were covered if they worked on the actual production of goods for commerce:

> "or in any process or occupation *necessary* to the production thereof, in any State."

Thus, under the Act as then written, anything in the chain of causation which was necessary for the production of goods for commerce was covered by the Act.

As is shown in the Statement of the House Managers who handled the Conference Committee Report on the 1949 amendment, the members of Congress who drafted the amendment first deleted the word "necessary" and inserted requirements that the process or occupation be "closely related" and "indispensable" to production. Subsequently, the word "indispensable" was omitted and the words "directly essential" were substituted therefor."[14] The effect of these changes was, according to the authors thereof, to narrow the coverage of the Act and to remove therefrom numerous local activities which had theretofore been ruled subject to the Act.

In the regulations quoted near the beginning of this Brief, the Wage and Hour Division has also interpreted the 1949 amendment as being intended to narrow the scope of coverage in production for commerce cases, saying in that respect, Section 776.17(a):

> "The legislative history shows that the new language in the final clause of Section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage (engaged neither 'in commerce' nor in actually 'producing or in any other manner working on' goods for commerce) whose coverage under the Act formerly depended on whether their work was 'necessary' to the production of goods for commerce. *Some employees whose work might meet the 'necessary' test are now outside*

[14] For the House Managers' exact remarks, see Appendix *infra*.

the coverage of the Act because their work is not 'closely related' and 'directly essential' to such production . . ."

Seemingly, the effect of the 1949 amendment first came before a Court of Appeals in *Juarez v. Kennecott Copper Corporation*, 225 F(2d) 100, a Tenth Circuit case. That Court said:

> "Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these arose prior to the amendment of Section 203 (j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods, or *in any closely related process or occupation* directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees."

The question next came before the Sixth Circuit in *Mitchell v. Moore*, 241 F(2d) 249, and that Court said:

> "The cases cited above which are particularly relied upon by appellant were decided prior to the 1949 amendment of Section 3(j) of the Act. At that time the statutory definition of 'production of goods' included working in any process or occupation 'necessary to the production thereof.' The amendment reworded that portion of the section so as to read 'working . . . in

> any '*closely related* process or occupation *directly essential* to the production thereof . . .' [italics added by the Court] Before the amendment, coverage under the Act was held by the courts to include a number of situations where work, although related or necessary to the production of the goods under consideration was not directly essential to such production [citing cases]. *It was the purpose of the 1949 amendment to remove such cases from coverage under the Act.* In order for coverage to exist, the amendment requires a closer and more direct relationship to the producing activities than existed in such cases."

Likewise, in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, the Seventh Circuit said:

> "We agree . . . that Congress intended the amendment to restrict coverage from that indicated by some of the earlier court decisions."

Hence, in deciding the instant case, the Fifth Circuit was but following the decisions of at least three other Circuits when it said (R. 96):[15]

> "In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word 'necessary' to the term 'directly essential,' and by adding also the words 'closely related' to modify the word 'occupation.' Reference need not be made to Committee reports

[15] The Fifth Circuit had earlier recognized the restrictive nature of the amendment in *Mitchell v. Jaffe*, 261 F (2d) 883.

> or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add rather than detract from the class of employees to be considered engaged in local enterprises."

As the Courts recognized in all of these decisions, the terms "closely related" and "directly essential," as used in the Act, have a definite meaning with respect to the chain of causation which conjoins a particular activity and a particular goods that is produced for commerce, and the effect of those requirements is to serve to lessen the number of links to which coverage is applicable. Even under the old "necessary" test, this Court recognized in *10 East 40th Street Bldg., Inc. v. Callus*, 325 U. S. 578, 65 S. Ct. 1127, that:

> ". . . merely because an occupation is indispensable in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act . . . Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line."

Petitioner repeatedly tries to deprecate the application of the *Callus* case to a situation such as the one at bar, stating that the Fifth Circuit erred in following the reasoning of such case (P. Br. 16, 53-55). If the Fifth Circuit so erred, then the Tenth,

Sixth and Seventh Circuits have likewise erred since, in the decisions cited above, each of those Courts also leaned heavily upon the *Callus* case in deciding what was and was not "closely related" and "directly essential to the production of goods for commerce."

In the *Callus* case, this Court said that the activity there involved:

> "*is too many steps removed* from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act."

Exactly the same thing is true in the case at bar—the activities of Respondent's employees were "too many steps removed from the physical process of the production of goods" for coverage to obtain.

In *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116, this Court said that the:

> "problem is, of course, one of drawing lines, but it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn."

While fixed points are lacking,[16] numerous authorities lend aid in drawing the line, among which are:

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[16] In Section 776.17 of its regulations (see the Appendix *infra*), the Labor Department itself recognized that "No precise line of inclusion or exclusion may be drawn."

(a) In the aforementioned Conference Committee Report concerning the 1949 amendment, the Committee gave specific examples of prior decisions which in effect were overturned by the amendment because of its restriction on coverage. One such specific example was *Schroeder v. Clifton*, 153 F(2d) 385, *cert. denied*, 328 U. S. 858, 66 S. Ct. 1351. In that case, the employees quarried rock and transported it to a site where a dike was being constructed. The dike would serve as a dam and would prevent wells which produced oil for commerce from being flooded. The activities of the employees who built the dike in that case were at least as essential and as related to the production of goods for commerce as were the activities of Respondent's employees in the instant case, yet the Conference Committe stated in plain words that the Labor Department and the Courts would no longer be able to hold the Act applicable in cases where the facts were similar to those in the *Schroeder* case, since such activities would not meet the "closely related" and "directly essential" tests. If the *Schroeder* situation is no longer covered by the Act, then most certainly it should not be held that the case at bar is so covered.

It is here that the case of *Tobin v. Pennington-Winter Construction Co.*, 198 F(2d) 334, *cert. denied*, 345 U. S. 915, 73 S. Ct. 494, is also to be contrasted. In finding coverage in that case, a divided Court held:

> "The construction of this dam is no more than improvement of an existing project for the con-

trol of floods and the betterment of navigation . . .

> "They [the projects involved] are no more than an addition to, or an improvement of, *an existing instrumentality of interstate commerce.*"

The *Pennington-Winter* case was, therefore, an "in commerce" case of the type not governed by the "closely related" and "directly essential" tests which were written into the Act with respect to production cases. As was pointed out above by quotation from the decision in *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, in "in commerce" cases the courts have included employees whose activities, while not in the actual stream of commerce, were so intimately connected therewith as to be for all practical purposes a part of commerce itself. Such were the dam workers in *Pennington-Winter*. Contrariwise, in the instant case, the problem is to appraise the status of workers on a dam who admittedly were not "in commerce" or so intimately connected therewith as to be for all practical purposes a part thereof, but who are covered, if at all, only by the thin shred which connects them with the production of goods by other workers in distant areas.

(b) Another case which the Conference Committee said would no longer represent the law is *McComb v. Super-A Fertilizer Works*, 165 F. (2d) 824, where coverage had been held for employees of a fertilizer company which sold all of its fertilizer to farmers for use in sugar cane fields, with the cane thereafter being processed into raw sugar and sold in commerce.

The Conference Committee explicitely said that such a situation will no longer be covered since it does not meet the tests of the 1949 amendment. Is the causal connection between the work of Respondent's employees on Mathis Dam and the production of goods for commerce in Corpus Christi any less remote or any more susceptible to the tests of the amendment?

(c) Also akin is *Mitchell v Moore*, 241 F. (2d) 249, where the employees were engaged in manufacturing and processing livestock and poultry feed which was fed to animals and fowls that were sold and shipped in commerce. With appreciation of the limiting effect of the 1949 amendment, the Court held that close relationship and direct essentiality were lacking and that the employees were not covered. If, as held by the Court, remoteness was there present, is there not like remoteness in the case at bar?

(d) The same observations can also be made with respect to the "hospital cases," *Juarez v. Kennecott Copper Corporation*, 225 F. (2d) 100, and *Huke v. Ancilla Domini Sisters*, 267 F. (2d) 96, where the providing of hospital and medical care for workers directly engaged in the actual production of goods was held too remote for coverage.

(e) Another aid in drawing the line is afforded by this Court's logic in the *Callus* case, and especially in the distinction which the Court there made between its holding in that case and its holding in *Borden Co. v Borella*, 326 U. S. 679, 65 S. Ct. 1223, and *Kirschbaum v. Walling*, 316 U. S. 517 62 S. Ct. 116. In the latter two cases, coverage was found

for employees in two buildings which were owned and occupied for the primary purpose of serving commerce. On the other hand, in the *Callus* case this Court held that coverage did not exist in the case of an office building used generally by a diverse number of tenants in various kinds of businesses, including a few whose businesses were related to commerce.

In so holding, the Court said:

> ". . . an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts."

Precisely parallel reasoning is applicable here. If Respondent had built a dam which was to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued that Respondent's employees were covered since the dam, like the buildings in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce.

However, the Mathis Dam is not such a dam, for it was not designed primarily to furnish water for industries producing goods for commerce. Rather it,

like the office building in the *Callus* case, was intended to serve and does serve a miscellany of water customers—residential, commercial, institutional, and municipal, as well as industrial (R. 32). The District Judge aptly described the purpose of the Dam when he said (R. 33-34):

> "Well, I think that it is admitted that the dam is to get adequate water supply, not only for Corpus Christi, but for the whole area . . . that is the advertised purpose, and we voted for it, to get an adequate water supply for this area, for our yards, our homes, our industries and other people that needed it, not only in the town, but in this area here."

To track and paraphrase this Court's language in the *Callus* case, a dam so intended for serving the usual miscellany of water users "has many differences in the practical affairs of life" from a dam intended to serve solely or primarily those engaged in the production of goods for commerce, "and the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the Courts." [17]

(f) Additional aids in drawing the line are afforded by the regulations of the Wage and Hour Division which are quoted above and are set forth

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[17] The analysis of the *Kirschbaum, Borden* and *Callus* cases which the Seventh Circuit made in its opinion in *Huke v. Ancilla Domini Sisters*, 267 F(2d) 96, states at more length what Respondent has just tried to say concerning those cases.

in greater detail in the Appendix hereto. Among the factors there set forth as subjects for consideration in determining the relationship and essentiality of a particular activity are:

(i) Where, when and how the activity is performed in relation to the production to which it pertains.

(ii) Whether the activity is performed within or without the productive enterprise.

(iii) Whether its performance is with the primary view of aiding production, or is for some different purpose.

(iv) How immediate or delayed is the activity's effect on production.

(v) The number and nature of any intervening operations or processes between the activity and the production.

(vi) And, in an appropriate case, the characteristics and purposes of the employer's business.

The effects of a consideration of these factors are obvious. In his brief, Petitioner has scoffed at Respondent's mention of the fact that the activities of the employees at Mathis Dam were 42 miles distant as a matter or geography, and several contracts distant as a matter of contractual connection, from the actual production of goods in Corpus Christi. According to Petitioner, these are "technical conceptions," deserving of no consideration (P. Br. 17-18,

56-60). In so arguing, Petitioner runs counter to his own regulations which say that "place" of performance of the activity is to be considered and he also disregards this Court's statement in the *Callus* case that "remoteness of a particular occupation from the physical process is a relevant factor in drawing the line." Most certainly, remoteness in geography and in contractual connection are not decisive in this case, yet they are indeed relevant factors.

It will be most difficult for Petitioner to deny that each and every one of the above factors, contained and set forth in his own regulations, points to a decision of non-coverage in this case. Respondent is not in the business of producing goods for commerce; the activities of Respondent's employees were performed outside, rather than in, any productive enterprise. Such activities were not performed for the primary purpose of aiding industries which produce goods for commerce; rather, they were performed to aid in furnishing water to all residents of the Corpus Christi area, of which the producing industries form only a segment. The activities had no immediate effect on the production of goods for commerce. Rather, such activities affect the production of goods only in the remote sense that, long after the activities were performed, production of goods is aided when a factory worker takes a drink of water or puts water in a boiler or cooling tower. Finally there are indeed a large number of intervening operations or processes between the activities performed by Respondent's employees and the eventual production of goods.

(g) All of these matters lead to one final consideration which is most practical and non-technical, to-wit: If remoteness is not present in the situation at bar, when, if at all, can remoteness—lack of close relationship and of direct esentiality—ever exist in a situation involving and supplying water, some of which winds up being used by producers of goods for commerce? If coverage exists in this case, then in connection with the supplying of water where, if at all, can the required line ever be drawn?

As is said above, the terms "closely related" and "directly essential" must mean something with respect to the chain of causation, and their meaning can only serve to lessen, rather than increase, the number of links in the chain to which coverage is applicable. If Petitioner is correct in his contentions, then in connection with the supplying of water the entire causal chain is covered, and the terms so deliberately inserted into the Act by the 1949 amendment are rendered meaningless.

In this connection, it should not pass unnoticed that Petitioner seems to feel that some magic lies in the fact that water, rather than some other substance, is involved in this case. Is such a view practical, or is it not merely another of Petitioner's technical conceptions? Insofar as the tests of close relationship and direct essentiality are concerned, is water to be treated any differently than the feed involved in *Mitchell v. Moore* or the medical care involved in the hospital cases, *supra?* Does water stand in any higher status under the Act than feed or other substances?

If water is involved, is there never any situation in which this Court will say, as it did in the *Callus* case, that the activity in question "is too many steps removed from the physical process of the production of goods"? The two cases involving the supplying of water which Petitioner repeatedly cites (P. Br. 47-48, 50, 60)[18] were both decided prior to the 1949 amendment; and, in both cases, the activities of the employees were far more closely related and directly essential to the production of goods than were the activities of Respondent's workers, since the employees in those cases were maintaining the irrigation ditches and actually watering crops grown for commerce. In addition, the actual question at issue in those cases was whether the irrigation company employees were exempt from the Act as agricultural workers or as employees of a service establishment.

Most definitely, those cases do not establish that water, merely because it is water, has some character of exalted status which removes it from the drawing of the line required with respect to other substances; and, if water stands in any special position, it will have to be so placed by something other than the language of the Act.

V.

The cases principally relied upon by Petitioner are "in commerce" cases wherein the courts

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[18] *Reynolds v. Salt River Valley Water Users Ass'n.*, 143 F(2d) 863, *cert. denied*, 323 U.S. 764, 65 S. Ct. 117; *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F(2d) 911, *aff'd*, 337 U.S. 755, 69 S. Ct. 1274.

have not been called upon to apply the tests of "closely related" and "directly essential." Although the "in commerce" cases and the principles uttered therein may find certain application herein, they are not decisive on the question of whether the construction of Mathis Dam meets such tests.

As is said above in the Summary of Argument, a case by case analysis of the dozens of decisions cited by Petitioner would unduly extend this brief and would be wholly unnecessary since Petitioner actually relies on very few cases. Respondent has already mentioned his reliance upon *Tobin v. Pennington-Winter Construction Co.*, 198 F. (2d) 334, *cert. denied*, 345 U.S. 915, 73 S. Ct. 494. The decisions of this Court upon which Petitioner mainly relies are *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 75 S. Ct. 860; *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 656; and *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 79 S. Ct. 260.

At the outset of any analysis of these cases, note should be taken of the fact that all are 'in commerce" cases, *Vollmer*, *Lublin*, and *Pennington-Winter* being clearly so, and *Alstate* being an "in commerce" case involving an interstate highway, although production features were also present.[19] To call these "in

[19] Even the production features of *Alstate* were unlike those in the instant case since the employer in that case was engaged in *actually mining and producing* the amesite which was being used "in commerce" on interstate roads, rather than merely being engaged in a process or occupation which, as a matter of causation, was related in some degree to the actual mining and production.

commerce" cases, as Respondent has done throughout this litigation, and as did the Fifth Circuit, is not to disparage them or to say that they are inapplicable to the case at bar.

Rather, Respondent has labelled these as "in commerce" cases for several reasons of clarity and convenience. As has perhaps been stated too often herein, the Act itself makes a distinction between "in commerce" situations and "production of goods" situations. Since the 1949 amendment, that distinction has been accentuated by the fact that the "closely related" and "directly essential requirements were written into the law applicable to the latter type of situation, whereas no comparable language in the Act governs the former. In neither *Vollmer*, *Alstate* nor *Lublin*, therefore, did this Court pass upon, or have occasion to pass upon, the effect of the requirements of the 1949 amendment. With that being true, it cannot be accepted as gospel that whatever Petitioner or anyone else might read into this Court's rulings in those three "in commerce" cases must be, or should be, deemed applicable to production of goods cases generally, or, in particular, to a production of goods case such as the one at bar in which need for interpretation and application of the "closely related" and "directly essential" tests is squarely before the Court.

Certainly, it would seem that the language in those cases concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all types of cases arising under the Act,

whether or not they are "in commerce" cases. Respondent has so accepted such language and has endeavored to analyze and submit this case in light thereof.

Certainly, also, full recognition must be had of this Court's holding in the *Vollmer* case and of its subsequent statement in the *Lublin* case concerning the supposed "new construction" doctrine. Perhaps when this Court referred in *Lublin* to "whatever vitality the 'new construction' doctrine retains after" *Vollmer* and *Gileo*,[20] it was merely softening the obsequies of a doctrine that is already wholly deceased. On the other hand, *Vollmer*, *Gileo* and *Lublin* were all "in commerce" cases, and in *Vollmer* the Court distinguished its holding therein from its earlier acceptance of the new construction doctrine in *Murphey v. Reed*, 335 U. S. 865, 69 S. Ct. 105, on the ground that the new construction work held exempt in the latter case was "not the improvement of a facility or instrumentality of inter-state commerce."

Perhaps, therefore, this Court's rejection of the new construction doctrine applies only to cases "in commerce," and has no application to situations such as those in *Murphey v. Reed* and in the case at bar which do not involve the improvement of a facility or instrumentality of interstate commerce. In deciding the instant case, the Fifth Circuit so intimated, with an apparent eye to what this Court held

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[20] *Southern Pacific Co. v. Gileo*, 351 U. S. 493, 76 S. Ct. 952.

in *Murphy v. Reed* and to what this Court said about such holding in *Vollmer* (R. 96-97). In view of the latter two cases, it cannot be said that the logic of the Fifth Circuit was without substance.

In any event, the facts concerning the location of Mathis Dam and its relationship to the "old dam" are undisputed and speak for themselves. Perhaps it is true, as Petitioner so vigorously maintains in one of his several castigations of the Fifth Circuit, that calling the building of Mathis Dam "new construction" would avail Respondent naught. On the other hand, labelling the Dam an "improvement or replacement" also solves nothing, unless this case is to be decided by name tags, rather than by practical considerations.

As is said above in Respondent's Statement, the District Judge probably was correct when he said that Mathis Dam is "at once an improvement, a rebuilding and a new construction." The problem at hand cannot be avoided or solved merely by affixing one or the other of those names to the Dam. Rather, the nature of the Dam and of its construction is significant only as it affords aid in determing whether the requisites of "closely related" and "directly essential" are met.

Even in the "in commerce" cases in which the new construction doctrine clearly no longer exists, this Court must still continue to determine whether any type of construction, be it new or otherwise, falls within the test stated in *McLeod v. Threlkeld, supra,*

by being "so closely related to the movement of the commerce as to be a part of it," and there still is before the Court the vexing problem of doing what Mr. Justice Stewart called in *Lublin* "deciding on which side of the shadowy line between such decisions as *McLeod v. Threlkeld* . . . and *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 1248," even an "in commerce" case falls.

Both in applying the tests of the 1949 amendment in "production of goods" cases and in locating the "shadowy line" in "in commerce" cases, practical considerations rather than technical labels should be paramount, and the practical considerations pertinent in this case have been spelled out in foregoing portions of this brief, especially in Subdivision IV, *supra*.

VI.

The two "Chambers cases" are neither applicable nor controlling in this case.

In seeking certiorari, Petitioner asserted a conflict between the decision of the Fifth Circuit herein and the decisions of the Eighth and Tenth Circuits in the so-called *Chambers* cases, *Mitchell v. Chambers Construction Company*, 214 Fed (2d) 515, and *Chambers Construction Company v. Mitchell*, 233 Fed (2d) 717, and he continues to cite and rely heavily upon those cases in his brief. Neither of the *Chambers* cases should be deemed applicable or controlling herein.

In the first case, by the Eighth Circuit, the question of coverage was not decided and, while affirming on other grounds the refusal of the district court to grant an injunction, the Court merely said that it was "inclined to agree" with the Secretary's contentions on coverage.

In the second case, as stated by the Court of Appeals herein (R.98), the Court "equated the new construction of facilities to be used for production of goods," without recognizing the two different bases of coverage and without any application to the latter situation of the tests of "closely related" and "directly essential" activities. In other words, that Court embraced Petitioner's contention that merely labelling something an "improvement or replacement" is enough to insure coverage, and that such a label suffices even though the case might be a production case rather than an "in commerce" one.

Moreover, the facts in the two *Chambers* cases are distinguishable from those at bar since both involved construction done on *water distribution systems*, rather than on facilities which result in the impounding of water that ultimately reaches a distribution system. As a result, the employees' activities in the *Chambers* cases pertained to the actual distribution of water to industrial plants, whereas in the instant case the building of Mathis Dam was far removed from the distribution systems of the City of Corpus Christi, and was even further removed from the delivery of water to industrial plants by the distribution systems. In addition, the construction

contracts in those cases were with the cities which owned the distribution systems, and the work was directly performed for them, whereas in the instant case the construction contract was with the Nueces Water District, and the building of the dam for the District was only in an indirect sense work done on behalf of the City which owned the distribution systems that in turn supplied the usual miscellany of city water customers, including industrial plants in and around Corpus Christi.

VII.

If coverage was present in this case, the District Court properly exercised its discretion with respect to the scope of the injunction, and such exercise should not be disturbed.

In this case, the District Court found coverage, but, in the exercise of the discretion which it plainly possesses, limited the injunction that it granted to the Mathis Dam project, rather than granting a blanket injunction pertaining to all of Respondent's activities.

In the Court of Appeals, Petitioner Secretary of Labor filed a cross-appeal complaining of the scope of the injunction. Since that Court held that no coverage existed, Petitioner's cross-appeal never came to decision.

However, in this Court Petitioner also is contending that, if coverage is found, this Court should override the discretion vested in the trial court and

grant a blanket injunction. Again, this Court's recent decision in *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 212, 79 S. Ct. is pertinent for, even though the Court there held that coverage existed (contrary to the holding in both courts below), the Court said that, upon its reversal and remand:

> "it will still be within the discretion of the District Court whether or not to issue an injunction,"

citing *Mitchell v. Bland*, 241 F. (2d) 808, wherein the Court held that the trial court:

> "would have been justified in either granting or denying injunctive relief under the broad discretion lodged in it by accepted equitable principles."

Prior to this latter decision, the Court which decided it had had before it in *Mitchell v. Hodges Contracting Company*, 238 F. (2d) 380, a situation in which a construction company had completed over 1,100 jobs, with payrolls in excess of $300,000. Out of those 1,100 jobs, the Wage and Hour Division had questioned only five. The trial court found that coverage existed in three of the five jobs, but denied the injunction. In affirming such denial, the Court of Appeals reviewed established principles pertaining to the discretion of the trial courts in matters of this kind, and then said:

> "There was, first, the acknowledged fact that, as a general contractor doing miscellaneous construction work, coverage for this employer was

a shifting thing dependent upon the nature of the jobs being performed."

Certainly, that is true in the case at bar. Respondent is a general contractor doing many different types of jobs throughout the Nation.

The Court next said:

> "Despite a lengthy investigation, analysis revealed that in the two-year period and out of over 1,100 contract jobs, only five were questioned. Out of payrolls totaling in excess of $300,000 for this period, only small amounts of disputed overtime were involved."

Let us see how the facts in the instant case compare. Respondent has done approximately 1,200 construction jobs of varying kinds, with varying problems of coverage (R. 63). The value of these jobs has been "in excess of three hundred million dollars" (R. 63).

Despite this volume of work and the varying problems of coverage, Respondent has been involved in court proceedings under the Fair Labor Standards Act only two times—in the case at bar and in a case in New Mexico some years ago where a complicated question of coverage was also involved, *Mitchell v. Zachry*, 127 F. Supp. 377 (R. 63).[21]

[21] In that case, although finding coverage, the Court prefaced its opinion with the statement that "The question is an extremely close one, in the Court's opinion," 127 F. Supp. 377 at 380.

At no time has Respondent ever been sued by an employee for any alleged violation of the Act (R. 63-64). As is shown in Respondent's Statement above, during the three years immediately prior to the trial hereof, Respondent had a total of 185 jobs, and it concluded that 178 of them, or 96.2% of the total, were covered by the Act.

Respondent necessarily bids on a great number of jobs in the course of its business (a far greater number than it obtains), and consistently seeks opinions from its legal department concerning coverage. The legal department is composed of four attorneys, two of whom are on this brief (R. 64-65). Respondent also has in its employ a man whose chief duties are to police jobs for compliance with labor laws, and to meet with the regional attorney for the Labor Department in Dallas, Texas, as well as with attorneys for the Labor Department in Washington, concerning the various Federal wage and hour laws. It was and is the practice and intention of Respondent in the past, present and future to comply with the provisions of the Fair Labor Standards Act whenever it is applicable (R. 65).

Respondent is engaged generally in the construction business and, in such, does all sorts of work. It cannot well be compared with a single business where only one or two types of activities are customarily and continually carried on, and where a single ruling on coverage would hold good until Congress changed the law. In the construction industry, the question of coverage is not so static. Rather, cover-

age can and does vary from job to job, and even on jobs in close proximity.

Notwithstanding this aspect of Respondent's business, and notwithstanding all of the above-stated precautions which Respondent takes to avoid any infraction of the Act in its operations, Petitioner seeks a broad, unlimited injunction in order to be able, in his own words, to enforce immediate payment or "restoration of under-payments resulting from *future* violations," by use of contempt proceedings (P. Br. 70). Petitioner thus by his own admission desires to use the injunctive procedure primarly as a summary method of collecting underpayments of wages, and he thus seeks to accomplish indirectly that which Congress specifically removed from his jurisdiction by enactment of the present provisions of Section 217 of the Act.

However, regardless of Petitioner's motives, the record does not in any event justify more than the limited injunction granted by the District Court. Respondent was not happy to see even such a limited injunction granted, but it recognizes that, having found coverage, the trial court acted within its discretion in granting such an injunction, and that it was keeping in mind the admonition that "there is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction."[22]

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[22] *Kent Products, Inc. v. Hoegh*, 245 Iowa 205, 61 N.W. (2d) 711; *Van Name v. Federal Deposit Insurance Corp.*, 130 N.J. Eq. 433, 23 A(2d) 261, *aff'd* 132 N.J. Eq. 302, 28 A(2d) 210, *Trisolini v. Meltsner*, 23 N.J. 204, 92 A(2d) 832.

Most certainly, the facts do not reveal that Respondent is a habitual violator of the Act, or that it flaunts the Act or intentionally violates it. Under such circumstances, the trial court could well have denied any injunction at all, but in the exercise of its discretion, it saw fit to grant a limited injunction. Clearly it had this discretionary power, and, under the principles announced by decisions of this Court, the exercise of such power should not be disturbed by any decision herein.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. If, however, such judgment should be reversed, the judgment of the District Court as to the scope of the injunction should not be disturbed and should be affirmed.

Respectfully submitted,

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APPENDIX

Legislative History

The following are pertinent parts of statement of the managers on the part of the House covering the 1949 amendment to the Fair Labor Standards Act of 1938. U. S. Code Congressional Service, 81st Congress, 1st session, Pages 2253-54.

Produced.—The House bill amended the definition of "produced" in section 3(j) by inserting the words "closely related" before the words "process or occupation" and substituting the word "indispensable" for the word "necessary". The Senate amendment left the definition of "produced" as contained in the present law unchanged. The bill as agreed to in conference follows the House bill except that the words "directly essential" are substituted for the word "indispensable".

Coverage under the act for a large category of employees is determined by the definition of the term "produced". The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee "producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods." Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance clerical, or custodial work. The second part of the present definition, covering any employee engaged in "any process or occupation necessary to the production" of

goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers (McComb v. Deibert (E. D. Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the act has also been extended to employees of an indepedently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N D. Ohio 1948).

Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (Kirschbaum v. Walling, 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods, for commerce, will remain subject to the act. All employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State (McComb, Administrator v. Super-A Fertilizer Works, 165 F. (2d) 824 (C.C.A.1)).

2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil

for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) 385 (C.C.A. 10); cert. den., 328 U. S. 858).

3. Employees of a local window-cleaning company doing business wholly within the State, but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (Martino v. Michigan Window Cleaning Company, 327 U. S. 173; reh'g den., 327 U. S. 816.)

4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in the producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 C. C. H., Labor Law Reporter, 4th Ed., No. 25,150,385).

All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory

workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

Regulations Involved

Various portions of the interpretative bulletin refered to above are as follows, same being extracts from Part 776, Tit. 29, Labor c. V, Wage and Hour Division, Department of Labor, Sections 776.0 to 776.30 of the Code of Federal Regulations, as amended:

ENGAGING IN THE PRODUCTION OF GOODS FOR COMMERCE

Section 776.14. Elements of "production coverage:

Sections 6 and 7 of the act, as has been noted, cover not only employees who are engaged "in commerce" as explained above, but also "each" and "any" employee who is engaged in the "production" of "goods" for "commerce". What employees are so engaged can be determined only by reference to the very comprehensive definitions which Congress has supplied to make clear what is meant by "production," by "goods," and by "commerce" as those words are used in sections 6 and 7. In the light of these definitions, there are three interrelated elements of coverage to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be "production"; (b) such production must be of "goods"; (c) such production of goods must

be "for commerce"; all within the meaning of the act. The three elements of "production" coverage are discussed in order in the sections following."

Section 776.17. Employment in a "closely related process or occupation directly essential to" production of goods—(a) coverage in general:

Employees who are not actually "producing * * * or in any other manner working on" goods for comerce are, nevertheless, engaged in the "production" of such goods within the meaning of the act and therefore within its general coverage if they are employed "in any closely related process or occupation directly essential to the production thereof, in any State." Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged "in any process or occupation necessary to the production" of goods for commerce. The amendments deleted the word "necessary" and substituted the words "closely related" and "directly essential" contained in the present law. The words "directly essential" were adopted by the Conference Committee in lieu of the word "indispensable" contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both "closely related" and "directly essential" to the production of goods for interstate or foreign commerce.

The legislative history shows that the new language in the final clause of section 3(j) of the act is intended to narrow, and to provide a more precise guide to, the scope of its coverage

with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the act formerly depended on whether their work was "necessary" to the production of goods for commerce. Some employees whose work might meet the "necessary" test are now outside the coverage of the act because their work is not "closely related" and "directly essential" to such production, others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.

The scope of coverage under the "closely related" and "directly essential" language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language, this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier "necessary" test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

(b) Meaning of "closely related" and "directly essential". The terms "closely related" and "directly essential" are not susceptible of precise definition; as used in the act they together describe a situation in which; under all

the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce (1) which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.

Not all activities that are "closely related" to production will be "directly essential" to it, nor will all activities "directly essential" to production meet the "closely related" test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work "closely related" to such production, but some such employees may be outside the coverage of the act because their work is not "directly essential" to production of the goods. (For a discussion of this point and specific illustrations, see section 776.18(b).). Similarly, there are some situations in which an employee performing work "directly essential" to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them "closely related" to the productive activities of another. (For a

more detailed discussion and specific illustrations, see section 776.19).

(c) *Determining whether activities are "closely related" and "directly essential".* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words "directly essential" refer only to the relationship of the employee's work to production. Work "directly essential" to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is "closely related" to production cannot be limited to those which show its closeness in terms of need or function. It may also be important to ascertain for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purpose with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in section 776.18 and 776.19).

(2) The determination of whether an activity is closely or only related to production may thus involve consideration of such factors, among

others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view of aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employers business. Moreover, in some cases where particular work "directly essential" to production is performed by an employer other than the producer, the degree of such essentiality may be a significant factor in determining whether the work is also "closely related" to such production. (See section 776.19).

No one of the factors listed above is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite "close and immediate tie" to the production of goods for interstate or foreign commerce. It is the sum of the factors relavant to each case that determines whether the particular activity is "closely related" to such production.

The application of these principles is further explained and illustrated in section 776.18 and 776.19.

(3) In determining whether an activity is "directly essential" to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is "essential" and "directly" so to such operations. There are questions of degree; even "directly" essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see section 776.18(a) and 776.19) will vary in degree of their essentiality and in the directness of the aid which they provide to production. An activity may be "directly essential" without being indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new factory itself, are not "directly" essential. An activity which provides something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in production of goods for commerce (see section 776.19(b)) will, however, be no less "directly" essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.

Section 776.20(b). The Act's definitions do not, however, include as 'goods' such things as dams, river improvements, highways and viaducts, or railroad lines.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 83

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent states that it "places no especial reliance" on "any supposed doctrine" that "new construction" is exempt from the Fair Labor Standards Act, and that "[d]efinitely * * * the adjective attached to such construction should not be determinative of the ultimate decision" of the coverage issue in this case (Resp. Br., p. 12). Also, respondent concedes that "the language [of the *Vollmer*, *Alstate* and *Lublin* decisions] concerning liberal construction of the Act and the use of practical considerations rather than technical conceptions is, and should be, applicable to all types of cases arising under the Act, whether or not they are 'in commerce' cases" (Resp. Br., pp. 63–64). However, respondent argues for a different,

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more narrow, scope of coverage in "production" cases on the ground that the main consideration here is the language and intent of the 1949 amended definition of "produced." Thus, respondent rests its case primarily, if not entirely, on its interpretation of the legislative intent of the 1949 amendment to the definition of "production" coverage. And since respondent relies essentially (Resp. Br., pp. 53–55) upon the few cases which the House Conferees' Report stated would be removed from the Act's coverage by the amended language (ignoring the numerous other cases which both House and Senate Reports expressly cited as illustrations of what would still remain covered), this reply brief, supplementing the discussion of legislative history in our Main Brief (pp. 49–53, particularly footnotes 26 and 27), may serve to clarify the significance and effect of the House Report and the cases on which respondent relies.

Apparently in deference to the express legislative approval (by both House and Senate) of *Kirschbaum*, respondent admits that if it had built the dam "to be used for the sole or primary purpose of impounding water for a concern or concerns engaged in the production of goods for commerce, it could with force be argued that Respondent's employees were covered since the dam, like the building in the *Kirschbaum* and *Borden* cases, *supra*, would be intended to have, and would have, basic use in the production of goods for commerce" (Resp. Br., pp. 22–23). But, relying solely on the House Report's examples of "local" enterprises, respondent contends that the legislative intent of the 1949 amendment was to expand the

application of the "logic" of *Callus'* reference to enterprises devoted to "all the usual miscellany" of customers, so as to remove from the Act's coverage "numerous local activities which had theretofore been ruled subject to the Act" (Resp. Br., pp. 48, 55–57). Despite the emphatic disavowal, by both House and Senate Conferees, of any intent to remove "numerous" activities or employees from the Act's coverage,[1] and despite the omission of any reference to *Callus* in either the House or Senate Reports (in contrast to the specific references to *Kirschbaum, Borden,* and several other decisions, see Petitioner's Main Brief, pp. 50–54), respondent infers a legislative intent to tear part of the language of the *Callus* opinion from its context and adopt it as a controlling criterion for drawing the line of coverage.

Admittedly, no inference of legislative disapproval of the *Callus* decision, in the factual circumstances there involved, can be drawn from the legislative silence, but respondent's inference of expression not only misconceives the import of that decision, but is plainly contradicted by the cases which the legislative reports of both Houses expressly specified would remain within the coverage of the amended language. There is, for example, no more striking type of enterprise serving the "usual miscellany" of local cus-

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[1] In addition to the statements quoted in Petitioner's Main Brief, pp. 44–45, see Representative McConnell's explanation of the House Conferees' statement (95 Cong. Rec. 14936):

> I want it very definitely understood, and I have had some estimates of it, that the use of the words "directly essential" and "closely related" will take out from coverage of the Act less than 200,000 workers.

tomers than the public utility cases (which respondent significantly omits to mention)—work which both Senate and House Reports expressly emphasized would remain within the coverage of the amended language (see Petitioner's Main Brief, pp. 50–52).

Examination of the public utility cases and other comparable cases thus specifically endorsed (95 Cong. Rec. 14874–75) conclusively refutes any inference of legislative intent to limit coverage to work on facilities "intended to serve solely and primarily those engaged in the production of goods for commerce." On the contrary, these cases confirm the Congressional purpose to adhere to the well-settled principle that a substantial and regular use in the production of goods for commerce invokes the Act's coverage even though an enterprise may not be predominantly devoted to such interstate use.[2]

Thus, in the *Roland* case (see Petitioner's Main Brief, p. 52, fn. 26), only 33 out of approximately a thousand of the miscellaneous customers were engaged in interstate activities; in *Lewis* v. *Florida Power & Light Co.* (*ibid.*), only about 14% of the company's total electric power was shown to have been furnished customers for use in interstate activities (the percentage does not appear in the court's opinion, but is in the record of that case, R. 13); *Walling* v. *Thompson*,

[2] The Act has consistently been held applicable to employees engaged in work inseparably related to both interstate and intrastate commerce, even though "all of respondent's business is not shown to have an interstate character" (see *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572), and even where work may predominantly serve intrastate purposes, as long as it also serves substantial and regular interstate uses. *Walling* v. *Roland Electrical Co.*, 326 U.S. 657; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178; and *Schulte* v. *Gangi*, 328 U.S. 108.

65 F. Supp. 686 (S.D. Cal.), another of the decisions specifically approved by the Senate Report (95 Cong. Rec. 14875), upheld coverage of employees of a firm engaged in installation, repair and maintenance of burglar alarm systems leased to a general miscellany of local customers, only 7.5% of whom were engaged in production of goods for commerce, and in *Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5)—another case specifically endorsed by the Senate Report—employees of an independent watchmen service agency were held within the coverage of the Act, where only 20% (59 out of 294) (see the district court opinion, *Fleming* v. *Sondock,* 43 F. Supp. 339, 340 (S.D. Tex.)) of the agency's regular customers were engaged in interstate commerce or in the production of goods for interstate commerce, the remainder being local business establishments and private residences.[4]

While the House Report's disapproval of the cases on which respondent relies (see *Schroeder* v. *Clifton* and *McComb* v. *Super-A Fertilizer Works,* Resp. Brief, pp. 53–54) may not, in strictest logic, be consistent with its approval of the utility cases and other types of work whose coverage it agreed would not be affected by the amended language, this possible inconsistency can hardly be construed as overriding the expressed intent to which both House and Senate agreed (not just one House alone), or as superseding the un-

[4] In still another case specifically endorsed by the Senate Report—*Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.)—the fact that a "substantial part" of a saw mill's production consisted of production of mine props or timbers, sold to coal companies for use locally in coal mines producing coal for interstate commerce, was held sufficient to bring the saw mill's employees within the coverage of the Act.

ambiguously expressed intent of the Senate Report with respect to specific cases which the House Conferees "did not choose to speak about."[4] Certainly, the fact that the House Conferees expressed a purpose to exclude from coverage a few specified cases, not consistent with or contemplated by the Senate's expressed intent, does not warrant an inference that it was the intent of the Congress as a whole to narrow coverage even more substantially than the House Report itself specified.

The amended language is obviously not so rigid and inflexible as to require extension of the "logic" of the cases on which respondent relies, in order to give effect to the House Report's intent to exclude the particular cases there mentioned. The furnishing of fertilizer in the *Super-A Fertilizer* case, or rock for the construction of the dike in *Schroeder* v. *Clifton*, or the window-washing in *Martino* v. *Michigan Window Cleaning Co.* (see 95 Cong. Rec. 14929), can

[4] The explanation of the House Report's apparent inconsistency probably stems from the divergent original House and Senate proposals. The amendment finally adopted was a compromise between the Senate view which was opposed to any restriction of coverage, and the House proposal for a more "rigid" restriction of coverage (95 Cong. Rec. 14874, 14936). As explained by Representative McConnell, a member of the House Conference Committee, "the statement accompanying the [House] conference report" tried to clarify the effect of the Conference agreement language by stating "the types of employees * * * who would not be affected by the words 'closely related' and 'directly essential'", but there were "borderline cases we did not choose to speak about; the courts will have to settle them" (*id.* at 14936); at the same time, he emphatically denied that any substantial number of employees would be removed from the Act's coverage by the language agreed to in conference (see *supra*, fn. 1).

reasonably be distinguished on the ground that the specific supplies and services there involved although obviously useful to the production of goods for commerce, were not as vitally and directly essential to the productive process as is the furnishing of water, electricity, fuel, machinery and tools and dies.[4] Further, it should be noted that the House Report, although designating the rock quarry employees in *Schroeder* for exclusion from coverage, did not so designate the employees actually constructing the dike (95 Cong. Rec. 14929). Similarly, although designating for exclusion the local architectural firm's "preparation of plans for the alteration of buildings * * * which are used to produce goods for interstate commerce," the House Report refrained from so designating the actual construction of the alterations (*ibid.*).

Respondent's heavy reliance on the post-1949 "hospital cases" (Resp. Br., pp. 49, 55), and on the peculiarly unique case of *Mitchell* v. *Moore* (*ibid.*),

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[4] Thus, the Administrator's Interpretative Bulletin (excerpts of which are printed in Respondent's Brief, pp. 78–84), undertook to construe the legislative intent in terms of "merely useful guides for determining whether the total situation * * * demonstrates the requisite 'close and immediate tie' to the production of goods," pointing out, *inter alia*, that "in some cases * * * the degree of such essentiality may be a significant factor in determining whether the work is also 'closely related' to such production," that "[n]o one of the factors listed above is necessarily controlling," and some factors "may have more significance than others in particular cases, depending upon the facts"—in short, that "[i]t is the sum of the factors relevant to each case that determines whether the particular activity is 'closely related' to such production" (29 C.F.R. 776.17, quoted in Resp. Br., p. 83).

only serves to indicate the extremes to which respondent would carry its conception of the "logic" of those decisions so as to exclude "numerous" wholly dissimilar activities from the Act's coverage. The Administrator has never construed the amended Section 3(j) as covering maintenance employees of such hospitals* because these hospital maintenance cases reflect the very distinction which Congress drew between facilities only indirectly useful or "necessary" to efficient production and those directly essential to the productive processes.

Finally, respondent's argument, like the opinion of the Court of Appeals below, simply brushes aside a most important practical consideration—that this construction project itself impounds or "produces" the water supply which, admittedly, is necessarily and substantially, if not predominantly, devoted to furnishing the large quantities needed for the functioning of the interstate instrumentalities and the interstate manufacturing industries in Corpus Christi and vicinity. Respondent's specific obligation, under its construction contract, to maintain the existing water supply without interruption (see Petitioner's Main Brief, pp. 5–6) attests to the close, immediate, and essential relationship of an adequate water supply to the continued functioning of such interstate activities. Respondent advances no argument to refute the ground of coverage resting on the principle of the *Alstate* decision, or to distinguish the work here from the oil drilling work held covered in the *Warren-*

* See *Maneja* v. *Waialua Agricultural Co.*, 216 F. 2d 466, at 473 (C.A. 9), reversed on other grounds, 349 U.S. 254.

Bradshaw case (see Petitioner's Main Brief, pp. 60–62). As explicitly pointed out in the House Report:

> The definition [of "produced"] is divided into two parts. The first part, *which the conference bill leaves unchanged,* covers any employee "producing, manufacturing, mining, handling, transporting or in any other manner working on * * * goods" [95 Cong. Rec. 14928, emphasis added].

Employees engaged in such "actual production activities," covered by "the first part" of the definition, were thus left entirely untouched by the amendment (*ibid.*). As pointed out in Petitioner's Main Brief (p. 62), at least to the extent that the water was impounded to supply the needs essential to the functioning of interstate instrumentalities, it was no less actual production of goods "for commerce," in this primary sense, than the preparation of road materials for use in highway improvements, or production of ice for refrigeration of railroad cars.

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FEBRUARY 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960